Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

RAUL PERCIRA GONCALVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, an alien found deportable because of his criminal convictions, applied for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). The Board of Immigration Appeals (BIA), following an earlier decision of the Attorney General, concluded that he was statutorily ineligible for such discretionary relief under amendments to Section 1182(c) made by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Respondent filed a petition for a writ of habeas corpus in district court, challenging the Attorney General's interpretation of Section 1182(c) and the constitutionality of that provision, but the district court dismissed for lack of jurisdiction. The court of appeals ruled that the district court had jurisdiction over respondent's claims under the general federal habeas corpus statute, 28 U.S.C. 2241. It also held, contrary to the Attorney General's interpretation, that the amendments made to Section 1182(c) by Section 440(d) of AEDPA do not apply to aliens who had already filed applications for Section 1182(c) relief as of the date of AEDPA's enactment.

The questions presented are:

1. Whether the district court had jurisdiction over respondent's challenges to his deportation order raised in his petition for a writ of habeas corpus.

2. Whether the Attorney General permissibly concluded that the amendments to Section 1182(c) made by Section 440(d) of AEDPA, providing that certain classes of aliens are ineligible for discretionary relief from deportation under Section 1182(c), should apply in the cases of aliens who had already filed applications for Section 1182(c) relief as of the date of AEDPA's enactment.

PARTIES TO THE PROCEEDING

Petitioners are Janet Reno, the Attorney General of the United States; Doris Meissner, the Commissioner of Immigration and Naturalization; Steve Farquharson, District Director of the Immigration and Naturalization Service (INS); the Department of Justice; and the INS. Petitioners were defendants in the district court and appellees in the court of appeals.

Respondent, who was the habeas corpus petitioner in the district court and the appellant in the court of appeals, is Raul Percira Goncalves.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	14
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Asencio v. *INS*, 37 F.3d 614 (11th Cir. 1994)	26
Ashby v. *INS*, 961 F.2d 555 (5th Cir. 1992)	3
Barreiro v. *INS*, 989 F.2d 62 (1st Cir. 1993)	26
Berehe v. *INS*, 114 F.3d 159 (10th Cir. 1997)	19
Buitrago-Cuesta v. *INS*, 7 F.3d 291 (2d Cir. 1993)	26
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	13, 27
Coronado-Durazo v. *INS*, 123 F.3d 1322 (9th Cir. 1997)	19
De Osorio v. *United States INS*, 10 F.3d 1034 (4th Cir. 1993)	26
Duldulao v. *INS*, 90 F.3d 396 (9th Cir. 1996)	19
Felker v. *Turpin*, 518 U.S. 651 (1996)	11
Foti v. *INS*, 375 U.S. 217 (1963)	16, 17
Francis v. *INS*, 532 F.2d 268 (2d Cir. 1976)	3
Fuentes-Campos, In re, Int. Dec. No. 3318 (BIA May 14, 1997)	8
Gonzalez v. *INS*, 996 F.2d 804 (6th Cir. 1993)	3
Gonzalez-Camarillo, In re, Int. Dec. No. 3320 (BIA June 19, 1997)	8
Hose v. *INS*, 141 F.3d 932 (9th Cir. 1998)	22, 23
INS v. *Elramly*, 518 U.S. 1051 (1996)	7
INS v. *Lopez-Mendoza*, 468 U.S. 1032 (1984)	25
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996)	21

Cases—Continued: Page

Jay v. *Boyd*, 351 U.S. 345 (1956) 21, 22
Jean-Baptiste v. *Reno*, 144 F.3d 212 (2d Cir. 1998) 23
Johnson v. *Robison*, 415 U.S. 361 (1974) 20
Kolster v. *INS*, 101 F.3d 785 (1st Cir. 1996) 9, 19
Landgraf v. *USI Film Products*, 511 U.S. 244 (1994) 7, 13
Magana-Pizano v. *INS*, 152 F.3d 1213 (9th Cir. 1998) 15, 19, 21, 22
Samaniego-Meraz v. *INS*, 53 F.3d 254 (9th Cir. 1995) 26
Santos v. *INS*, 124 F.3d 64 (1st Cir. 1997) 9, 19
Scheidemann v. *INS*, 83 F.3d 1517 (3d Cir. 1996) 25, 26
Shaughnessy v. *Pedreiro*, 349 U.S. 48 (1955) 16
Silva, In re, 16 I. & N. Dec. 26 (BIA 1976) 3
Soriano, In re, Int. Dec. No. 3289 (BIA June 27, 1996) .. 7, 23
Stone v. *INS*, 514 U.S. 386 (1995) 16, 17
Swain v. *Pressley*, 430 U.S. 372 (1977) 21
Tapia-Acuna v. *INS*, 640 F.2d 223 (9th Cir. 1981) 3
Ter Yang v. *INS*, 109 F.3d 1185 (7th Cir.), cert. denied, 118 S. Ct. 624 (1997) 19, 23
Turkhan v. *INS*, 123 F.3d 487 (7th Cir. 1997) 23
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973) 22
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 21

Constitution, statutes and regulation:

U.S. Const.:
Art. I, § 9 12
Cl. 2 (Suspension Clause) 2, 15, 18, 28
Art. III 18
Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(1), 110 Stat. 3657 6

Statutes and regulation—Continued: Page

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 2
§ 401(e), 110 Stat. 1268 ..... 2, 4, 16
§ 413, 110 Stat. 1269 26
§ 413(g), 110 Stat. 1269 13
§ 421, 110 Stat. 1270 ..... 13, 26
§ 435(b), 110 Stat. 1275 27
§ 440(a), 110 Stat. 1276 ..... *passim*
§ 440(d), 110 Stat. 1277 ..... *passim*
§ 440(f), 110 Stat. 1278 27
§ 441(b), 110 Stat. 1279 27
Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351 ..... 3, 5, 16
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 2-3
§ 304, 110 Stat. 3009-587 2
§ 304(b), 110 Stat. 3009-597 4
§ 306, 110 Stat. 3009-607 2
§ 306(c)(1), 110 Stat. 3009-612 6
§ 309, 110 Stat. 3009-625 2
§ 309(a), 110 Stat. 3009-625 4
§ 309(c)(1), 110 Stat. 3009-625 ..... 4, 5
§ 309(c)(2), 110 Stat. 3009-625 5
§ 309(c)(4)(A), 110 Stat. 3009-626 6
§ 309(c)(4)(G), 110 Stat. 3009-626 ..... *passim*
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 26
§ 511(a), 104 Stat. 5052 26
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 3
8 U.S.C. 1101(a)(43) (1994) 3
8 U.S.C. 1103(a)(1) (Supp. II 1996) 27
8 U.S.C. 1105a (1994) (repealed 1996) 5, 21
8 U.S.C. 1105a(a) (1994) (repealed 1996) 2, 3, 16
8 U.S.C. 1105a(a)(1) (1994) (repealed 1996) 18

Statutes and regulation—Continued: Page

8 U.S.C. 1105a(a)(10) (1994) (repealed 1996) 3, 4, 5, 6, 11, 16, 18
8 U.S.C. 1105a(b) (1994) 6
8 U.S.C. 1182(c) (1994) (repealed 1996) ..... *passim*
8 U.S.C. 1227(a)(2)(A)(ii) (Supp. II 1996) 8
8 U.S.C. 1229b (Supp. II 1996) 4, 24
8 U.S.C. 1229b(a)(3) (Supp. II 1996) 4
8 U.S.C. 1229b(b)(1)(C) (Supp. II 1996) 4
8 U.S.C. 1251(a)(2)(A)(ii) (1994) 4, 8
8 U.S.C. 1252 (Supp. II 1996) 5, 11
8 U.S.C. 1252(a) (Supp. II 1996) 2, 16
8 U.S.C. 1252(a)(1) (Supp. II 1996) 5
8 U.S.C. 1252(a)(2)(C) (Supp. II 1996) 5, 18, 19, 24
8 U.S.C. 1252(b)(1) (Supp. II 1996) 18
8 U.S.C. 1252(b)(6) (Supp. II 1996) 18
8 U.S.C. 1252(b)(9) (Supp. II 1996) 5, 20
8 U.S.C. 1252(g) (Supp. II 1996) 2, 6, 11, 15, 17, 21, 22, 23, 28
Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1751 26
28 U.S.C. 2241 ..... *passim*
28 U.S.C. 2241(c) 12
8 C.F.R. 3.1(h) 7

Miscellaneous:

H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. (1996) 27
H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961) 16
H.R. Rep. No. 22, 104th Cong., 1st Sess. (1995) 28
S. Rep. No. 48, 104th Cong., 1st Sess. (1995) 28

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General, the Commissioner of Immigration and Naturalization, the District Director of the Immigration and Naturalization Service (INS), the Department of Justice, and the INS, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-58a)[1] is reported at 144 F.3d 110. The memorandum opinion and order of the district court (App. 75a-78a) are unreported, as are the decision and order of the immigration judge (App. 59a-72a) and the decision of the Board of Immigration Appeals (App. 73a-74a).

[1] "App." refers to the separately bound appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1998. A petition for rehearing was denied on July 31, 1998. App. 79a-80a. On October 20, 1998, Justice Souter extended the time within which to file a petition for a writ of certiorari, to and including November 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 81a-90a) are pertinent portions of the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2; 8 U.S.C. 1105a(a) and 1182(c), as in effect before and after April 24, 1996; 8 U.S.C. 1252(a) and (g) (Supp. II 1996); Sections 401(e), 440(a), and 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268, 1276, 1277; Sections 304, 306, and 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-587, 3009-607, 3009-625; and 28 U.S.C. 2241.

STATEMENT

1. This case presents questions about the application and, potentially, the constitutionality of several major changes to the Nation's immigration laws enacted by Congress in 1996. Those changes were designed in large part to reduce the opportunities for criminal aliens to obtain administrative relief from deportation, and to facilitate their removal from the United States by streamlining and channeling judicial review of their deportation orders. Two enactments by Congress are particularly pertinent: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214; and the Illegal Immigration Reform

and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

a. Before the enactment of AEDPA, an alien lawfully admitted for permanent residence who was subject to deportation because of a criminal conviction could (like other permanent resident aliens) apply to the Attorney General for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994). To be eligible for such relief, the alien had to show that he had had a lawful unrelinquished domicile in this country for seven years, and that, if his conviction was for an "aggravated felony," as defined in the Immigration and Nationality Act (INA) at 8 U.S.C. 1101(a)(43) (1994), he had not served a term of imprisonment for that conviction of five years or longer. See 8 U.S.C. 1182(c) (1994).[2] If the Attorney General, in the exercise of her discretion, denied relief, then the alien could challenge that denial by filing a petition for review of his deportation order in the court of appeals. See 8 U.S.C. 1105a(a) (1994) (repealed 1996) (incorporating Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351). Under certain circumstances, an alien in custody pursuant to an order of deportation could also seek judicial review thereof by filing a petition for a writ of habeas corpus, pursuant to 8 U.S.C. 1105a(a)(10) (1994) (repealed 1996).

b. In 1996, Congress twice restricted both the substantive eligibility of criminal aliens for discretionary relief from

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[2] Although Section 1182(c) by its terms allowed the Attorney General to admit permanent resident aliens who had temporarily proceeded abroad and were returning to their domicile in the United States, it had long been interpreted (in response to the Second Circuit's decision in *Francis* v. *INS*, 532 F.2d 268 (1976)) also to permit the Attorney General to waive the grounds for deportation of lawfully admitted permanent resident aliens who were present in the United States and in deportation proceedings. See *In re Silva*, 16 I.& N. Dec. 26 (BIA 1976); *Gonzalez* v. *INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Ashby* v. *INS*, 961 F.2d 555, 557 & n.2 (5th Cir. 1992); *Tapia-Acuna* v. *INS*, 640 F.2d 223 (9th Cir. 1981).

deportation and the availability of judicial review of criminal aliens' deportation orders.

i. On April 24, 1996, Congress enacted AEDPA. Section 440(d) of AEDPA, 110 Stat. 1277, amended 8 U.S.C. 1182(c) to make certain classes of criminal aliens categorically ineligible for discretionary relief under that Section--including aliens who were deportable because they had been convicted of certain "crimes involving moral turpitude," see 8 U.S.C. 1251(a)(2)(A)(ii) (1994). At the same time, AEDPA repealed 8 U.S.C. 1105a(a)(10) (1994), which had permitted aliens in custody pursuant to an order of deportation to obtain judicial review in habeas corpus proceedings, and replaced it with an express *prohibition* of judicial review of deportation orders entered against aliens who are deportable by reason of having committed certain criminal offenses. AEDPA §§ 401(e) and 440(a), 110 Stat. 1268, 1276-1277. Thus, since the enactment of AEDPA, Section 1105a(a)(10) has provided that any final order of deportation against an alien who is deportable by reason of having committed one of the disqualifying offenses "shall not be subject to review by any court." 110 Stat. 1277.

ii. On September 30, 1996, Congress enacted IIRIRA, which comprehensively amended the INA. IIRIRA repealed Section 1182(c) on a prospective basis, and replaced it with another form of discretionary relief known as "cancellation of removal." See IIRIRA § 304(b), 110 Stat. 3009-597; 8 U.S.C. 1229b (Supp. II 1996). Certain classes of criminal aliens were made ineligible for cancellation of removal. See 8 U.S.C. 1229b(a)(3) and (b)(1)(C) (Supp. II 1996). The cancellation of removal provisions, however, were made applicable only to aliens who are placed in removal proceedings on or after April 1, 1997, and therefore do not govern this case. See IIRIRA § 309(a) and (c)(1), 110 Stat. 3009-625. For cases commenced prior to April 1, 1997, including this case, IIRIRA retained Section 1182(c)—including the

amendment made by Section 440(d) of AEDPA that made certain classes of criminal aliens ineligible for relief under Section 1182(c).

IIRIRA also replaced the INA's judicial review provision in 8 U.S.C. 1105a (1994) with a new 8 U.S.C. 1252 (Supp. II 1996), again for cases in which the administrative procedings were commenced on or after April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625. The new Section 1252 provides for judicial review of all final removal orders in the courts of appeals pursuant to the Hobbs Act, 28 U.S.C. 2341-2351. See 8 U.S.C. 1252(a)(1) (Supp. II 1996). Section 1252 also carries forward the preclusion of review in Section 1105a(a)(10) (as amended by AEDPA § 440(a)), by providing that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a crime within one of several classes of criminal offenses. 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996). The new Section 1252 further provides, in a paragraph entitled "CONSOLIDATION OF QUESTIONS FOR JUDICIAL REVIEW," that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section," 8 U.S.C. 1252(b)(9) (Supp. II 1996)—*i.e.*, only in the court of appeals, as provided in Section 1252(a)(1).

Cases (such as this one) in which the administrative proceedings were begun prior to April 1, 1997, continue to be governed by 8 U.S.C. 1105a, as amended by AEDPA. IIRIRA § 309(c)(2), 110 Stat. 3009-625. Even for such cases, however, Congress enacted special rules for any such cases in which the final deportation order is entered on or after October 31, 1996. One of those special rules, in Section 309(c)(4)(G) of IIRIRA, reinforces the preclusion of judicial

review in the amended Section 1105a(a)(10) by providing that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed [specified criminal offenses]." 110 Stat. 3009-626.[3]

Finally, in IIRIRA, Congress enacted a sweeping jurisdiction-limiting provision, 8 U.S.C. 1252(g) (Supp. II 1996), which provides:

> Except as provided in [8 U.S.C. 1252] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

The new Section 1252(g) is expressly made applicable "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." IIRIRA § 306(c)(1), 110 Stat. 3009-612 (as amended by Pub. L. No. 104-302, § 2(1), 110 Stat. 3657).

c. After the enactment of these major immigration laws, two important questions arose in immigration proceedings about the scope of Section 440(d) of AEDPA, which, as we have said, amended 8 U.S.C. 1182(c) to bar the granting of relief to certain criminal aliens. Like many other aliens in deportation proceedings affected by AEDPA and IIRIRA, respondent challenges his deportation order by seeking to litigate both of those questions. The instant case concerns whether, and if so in what forum, either of those

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[3] Congress further provided that, notwithstanding subsection (b) of 8 U.S.C. 1105a (1994), judicial review of final orders of *exclusion* during the transition period also would be in the court of appeals, not in the district court in habeas corpus proceedings. See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626.

challenges may be brought. On the merits, it also concerns the first of the two recurring questions, described below:

i. First, the question arose as to whether the amendment to Section 1182(c) made by Section 440(d) of AEDPA applies to aliens who had been placed in deportation proceedings before the enactment of AEDPA. On June 27, 1996, a closely divided Board of Immigration Appeals (BIA) initially decided that Section 440(d) does apply to deportation proceedings that had already been initiated, but that it should not be applied to aliens who had filed applications for Section 1182(c) relief in those proceedings before AEDPA's enactment. *In re Soriano*, Int. Dec. No. 3289 (App. 91a-123a). On September 12, 1996 (before IIRIRA was enacted), the Attorney General, exercising her authority under 8 C.F.R. 3.1(h), vacated the opinion of the BIA in *Soriano* and certified for her decision the question whether Section 440(d) applies to applications filed as of the date of its enactment.[4] App. 124a.

On February 21, 1997, the Attorney General concluded in *Soriano* that AEDPA Section 440(d) applies to all deportation proceedings pending on the date of its enactment, including those in which aliens had already submitted applications for Section 1182(c) relief. App. 125a-138a. Following the analytical framework set forth by this Court in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Attorney General concluded that application of Section 440(d) to pending deportation cases is not retroactive because it does not "impair a right, increase a liability, or impose new duties

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[4] Also on September 12, 1996, the Solicitor General filed a supplemental brief in this Court in *INS* v. *Elramly*, No. 95-939, addressing the temporal scope of AEDPA Section 440(d). In that brief, we argued (at 15-18) that Section 440(d) had divested the Attorney General of authority to grant Section 1182(c) relief in pending cases. On September 16, 1996, the Court remanded *Elramly* to the court of appeals for further consideration in light of AEDPA. *INS* v. *Elramly*, 518 U.S. 1051 (1996).

on criminal aliens. The consequences of Respondent's conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation." App. 131a-132a. The Attorney General further concluded that Section 440(d) "is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief." App. 132a.

ii. Second, the question arose whether AEDPA Section 440(d) bars the Attorney General from granting Section 1182(c) relief to criminal aliens who temporarily proceeded abroad and are seeking admission to the United States, as well as to criminal aliens in the United States who are in deportation proceedings. The BIA concluded in *In re Fuentes-Campos*, Int. Dec. No. 3318 (May 14, 1997), and *In re Gonzalez-Camarillo*, Int. Dec. No. 3320 (June 19, 1997), that Section 440(d) bars relief only for criminal aliens in deportation proceedings.

2. Respondent is a native and citizen of Portugal who was admitted to the United States as a lawful permanent resident alien in 1972. In January 1988 he was convicted in Massachusetts state court of larceny; in March 1989 he was convicted in state court of assault and battery with a dangerous weapon; and in June 1992 he was convicted in state court of knowingly receiving stolen property. C.A. App. 80-86. Because those offenses were two or more "crimes involving moral turpitude" under the INA, and because they did not arise out of a "single scheme of criminal misconduct," they rendered him deportable under the INA. See 8 U.S.C. 1251(a)(2)(A)(ii) (1994) (now recodified at 8 U.S.C. 1227(a)(2)(A)(ii) (Supp. II 1996)).

On December 11, 1990, the INS issued an Order to Show Cause against respondent.[5] Respondent conceded his deportability and applied to the immigration judge (IJ) for discretionary relief under Section 1182(c). On January 20, 1995, the IJ denied relief as a matter of discretion after a review of respondent's crimes and personal circumstances, and entered an order of deportation. App. 62a-72a.

Respondent appealed the denial of relief to the BIA. While his appeal was pending, Congress enacted Section 440(d) of AEDPA. On March 24, 1997, the BIA dismissed respondent's appeal, relying upon the Attorney General's decision in *Soriano*. App. 73a-74a.

3. On August 8, 1997, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts.[6] He contended that the Attorney General had erred in concluding that AEDPA Section 440(d) rendered him ineligible for Section 1182(c) relief. He also contended that AEDPA Section 440(d) violates constitutional equal-protection principles insofar as it is applied to bar relief under Section 1182(c) for criminal aliens in deportation proceedings, but not those returning from a temporary trip abroad. C.A. App. 7-13.

On August 14, 1997, the district court dismissed respondent's petition, concluding that Congress had divested the district courts of jurisdiction over challenges to deportation

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[5] The charges of deportability were originally based on the 1988 larceny and 1989 assault convictions, but the 1992 conviction for receiving stolen property was later substituted for the assault conviction as a basis for deportation. See C.A. App. 82.

[6] Respondent did not file a petition for review of his deportation order in the court of appeals. The First Circuit had previously held that Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA had divested it of all jurisdiction over petitions for review filed by criminal aliens covered by those Sections. See *Santos* v. *INS*, 124 F.3d 64 (1st Cir. 1997); *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996).

orders. The district court also concluded that, even if it retained a residual power to provide habeas corpus review of constitutional claims, it would deny relief because respondent's claims were without merit. App. 75a-77a.

4. The court of appeals reversed. App. 1a-58a. It concluded that the district court had jurisdiction over respondent's claims under the general federal habeas corpus statute, 28 U.S.C. 2241. On the merits, the Court ruled that the Attorney General's construction of Section 440(d) in *Soriano* was wrong, and that Section 440(d) of AEDPA does not apply to aliens in respondent's situation. The court therefore did not reach respondent's equal protection claim, and it remanded the case to the BIA for a determination whether respondent should be granted relief under Section 1182(c) as a matter of discretion.

a. On the jurisdictional issue, the court of appeals first concluded, as it had in earlier cases (see note 6, *supra*), that an alien in respondent's situation could not raise either his statutory or his constitutional claim by the usual means of judicial review of a deportation order—namely, in a petition for review filed in the court of appeals. App. 13a-17a. "A straightforward reading of [Section 309(c)(4)(G) of IIRIRA]," the court reasoned, "leads to the conclusion that IIRIRA does not permit initial jurisdiction in the courts of appeals to hear 'appeals' by aliens, like [respondent], who have been convicted of two crimes of moral turpitude." App. 15a. The court rejected the Attorney General's argument that, to the extent that an alien in respondent's situation might have a substantial constitutional claim, it may still be heard by the court of appeals on petition for review. See App. 11a-13a.

The court of appeals next concluded that the district court could entertain respondent's claims through an exercise of its general habeas corpus jurisdiction under 28 U.S.C. 2241. See App. 18a-38a. Framing the question as whether "Con-

gress has repealed 28 U.S.C. § 2241, as applied to immigration cases such as this one," App. 20a, the court rejected the government's argument that AEDPA and IIRIRA preclude district courts from reviewing deportation orders under 28 U.S.C. 2241. The court relied in large part on the presumption against repeal of habeas corpus jurisdiction by implication, as articulated in *Felker* v. *Turpin*, 518 U.S. 651 (1996). App. 20a-22a. "*Felker* makes clear," the court believed, that "if Congress intends to repeal or restrict habeas jurisdiction under § 2241, it must say so explicitly." App. 20a.

The court rejected the government's argument that the district court's habeas corpus jurisdiction to review the substance of deportation orders had been divested by AEDPA—which had repealed old Section 1105a(a)(10), providing for habeas corpus review if the alien was in custody, and had replaced it with a preclusion of judicial review of deportation orders entered against criminal aliens—and by IIRIRA—which had enacted the new jurisdiction-limiting provision in 8 U.S.C. 1252(g) (Supp. II 1996). AEDPA, the court reasoned, struck only the reference to habeas corpus in the INA itself (which it characterized as a "specialized immigration provision" designed to ensure that aliens in custody "would have a supplemental collateral remedy"), and did not expressly amend 28 U.S.C. 2241. App. 24a-25a. As for Section 1252(g)—which provides that, "notwithstanding any other provision of law," no court shall have jurisdiction to review any claim arising out of the Attorney General's decision to commence or adjudicate removal proceedings, except as provided under Section 1252 itself—the court declined to read the "notwithstanding" clause as affecting the district court's authority under 28 U.S.C. 2241. According to the court, the government's argument that Section 1252(g) divests the district courts of jurisdiction to review deportation orders under 28 U.S.C. 2241 "leads us to

apply the long standing rule disfavoring repeal of jurisdictional provisions by implication, a rule which is particularly appropriate here." App. 27a.

Further, the court stated, accepting the government's argument "would raise substantial and complex constitutional questions concerning the limits of Congress' power under Article III to control the jurisdiction of the federal courts," App. 28a, and could also require the court to decide whether preclusion of *all* judicial review of respondent's claims would constitute an unconstitutional suspension of the writ of habeas corpus, in contravention of Article I, Section 9, of the Constitution, App. 29a. The court suggested as well that the posture of this case implicates "the historical core of the Suspension Clause—jurisdiction to review the legality of detention by executive branch officers." *Ibid.*

Finally, the court held that respondent's claim to relief under Section 1182(c) fell within the scope of the district court's authority under 28 U.S.C. 2241. App. 31a-36a. The court observed that Section 2241(c) provides that the writ of habeas corpus shall not extend to a "prisoner" unless, *inter alia*, he is in custody "in violation of the Constitution *or laws* * * * of the United States." App. 31a (emphasis added by court of appeals). It also stated that "numerous immigration cases under the § 2241 jurisdiction have considered claims of statutory right, sometimes described as an integral part of ensuring due process *of law*." App. 31a-32a. The court rejected the argument that, because the Attorney General has the discretion to deny respondent's application for Section 1182(c) relief in any event, her decision concerning his statutory eligibility for that form of relief is itself not reviewable in habeas corpus; the court reasoned that, "[a]nalytically, the decision whether an alien is eligible to be considered for a particular discretionary form of relief is a statutory question separate from the discretionary

component of the administrative decision whether to grant relief." App. 34a-35a.

b. On the merits, the court of appeals held that the Attorney General's decision in *Soriano*—that Section 440(d) of AEDPA bars a grant of discretionary relief under Section 1182(c) in pending cases—is contrary to the presumption against retroactive application of federal statutes. App. 38a-57a. Although the court expressed doubt on the point (see App. 39a-40a & n.20), it assumed, for purposes of deciding the case, that the analytical framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—under which deference is owed to an agency's reasonable construction of a statute that is silent or ambiguous on the matter at hand—applies to the Attorney General's decsion about the "effective date of a governing statute." App. 40a. Nonetheless, the court concluded (App. 41a) that the first step of the *Chevron* analysis, "employing traditional tools of statutory construction," includes the "familiar * * * presumption against retroactivity" expressed in *Landgraf*, *supra*. Therefore, the court concluded, Section 440(d) is inapplicable to respondent unless there is "a plain statement from Congress that expressly provides for retroactive application." App. 42a.

The court's review of the text of AEDPA yielded no indication to its satisfaction that Congress had expressly intended that Section 440(d) be applied retroactively. The court noted that Sections 413(g) and 421 of AEDPA, 110 Stat. 1269-1270, which bar various forms of relief from deportation for aliens involved in terrorism, contained explicit "effective date" provisions. Those provisions, the court believed, would have been superfluous if Congress had thought that such restrictions "would as a matter of course be applied to pending cases." App. 44a-50a.

The court of appeals found its textual analysis bolstered by its understanding of AEDPA's legislative history. See

App. 51a-57a. The court observed that the original Senate version of the bill that became AEDPA had contained express language making what eventually became Section 440(d) retroactive, but that that language was dropped after a House-Senate conference. App. 52a-55a. And, the court noted, by the time IIRIRA was enacted later in 1996, the BIA had already concluded in *Soriano* that Section 440(d) of AEDPA should not be applied to pending applications for relief. The court therefore suggested that, when Congress enacted IIRIRA, it was "presumptively aware of what was then the governing agency interpretation," and yet Congress did not disturb that interpretation. App. 56a.[7]

REASONS FOR GRANTING THE PETITION

The court of appeals has erroneously decided two issues of broad significance for the administration of the Nation's immigration laws. First, it has concluded—notwithstanding successive congressional enactments channeling judicial review of all deportation orders into the courts of appeals, and significantly restricting judicial review of deportation orders affecting criminal aliens in particular—that criminal aliens may invoke the habeas corpus jurisdiction of the district courts under 28 U.S.C. 2241 to challenge the merits of their orders of deportation. That conclusion cannot be squared with the structure of judicial review of deportation orders that Congress has enacted. Moreover, as demonstrated by the hundreds of pending cases in which criminal aliens have sought habeas corpus relief, the ruling below will lead to significant delays in the removal of such aliens from the United States, despite Congress's clear intent that

[7] As we note at p. 7, *supra*, by the time IIRIRA was enacted on September 30, 1996, the Attorney General had already vacated the BIA's decision in *Soriano*, and the Solicitor General had already filed a brief in this Court taking the position that AEDPA Section 440(d) was applicable to already-pending applications for Section 1182(c) relief.

removal of criminal aliens be expedited and that all review in the district courts be eliminated. The court of appeals' jurisdictional ruling also raises issues closely related to those presented in *Magana-Pizano* v. *INS*, 152 F.3d 1213 (1998), in which the Ninth Circuit held (contrary to the First Circuit in this case) that 8 U.S.C. 1252(g) (Supp. II 1996) *does* divest a district court of habeas corpus jurisdiction under 28 U.S.C. 2241 to review deportation orders, but then further held that that statutory preclusion contravenes the Suspension of Habeas Corpus Clause of the Constitution, Art. I, § 9, Cl. 2. We accordingly are filing a petition for a writ of certiorari in *Magana-Pizano*, simultaneously with the filing of the petition in this case. We suggest either that certiorari be granted in both cases, or that the petition in *Magana-Pizano* be held pending the disposition of the petition and the decision in this case.

Second, the court of appeals has concluded that Section 440(d) of AEDPA, which restricted the eligibility of criminal aliens for discretionary relief from deportation under 8 U.S.C. 1182(c) (1994), implicates the presumption against retroactivity of federal statutes and so is not to be applied in the case of any alien who had submitted an application for discretionary relief before AEDPA's enactment. The question of the temporal scope of the amendments made by Section 440(d) affects thousands of aliens in pending administrative and judicial proceedings. More generally, the court's conclusion that AEDPA's amendment to Section 1182(c) implicates the presumption against retroactivity has potentially far-reaching consequences for the Attorney General's administration of the immigration laws, for it is at odds with the courts' historic treatment of deportation proceedings as inherently prospective in nature. Review is therefore warranted of the lower court's ruling on the merits as well.

1. a. The court of appeals' central jurisdictional conclusion in this case was that a criminal alien who is precluded from

obtaining judicial review of his deportation order in the court of appeals because of Section 309(c)(4)(G) of IIRIRA (and Section 440(a) of AEDPA) may instead obtain judicial review by filing a petition for a writ of habeas corpus in district court under 28 U.S.C. 2241. App. 30a. That result is fundamentally at odds with the statutory framework Congress has fashioned for judicial review of deportation orders. Since 1961, Congress has consistently provided that such review should proceed in the courts of appeals, in order to avoid delays in deportations.[8] It reenacted that basic aspect of the judicial review scheme in 1996. See 8 U.S.C. 1252(a) (Supp. II 1996). In 1996, Congress also expressly repealed the limited provision in 8 U.S.C. 1105a(a)(10) for habeas corpus review in the district courts for aliens held in custody pursuant to deportation orders that had remained in existence since 1961. See AEDPA § 401(e), 110 Stat. 1268 (titled "Elimination of Custody Review by Habeas Corpus"). Further, it restricted judicial review of criminal aliens' deportation orders to a considerable degree—in both Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA for cases in which deportation proceedings were commenced prior to April 1, 1997, and in 8 U.S.C. 1252(a)(2)(C) (Supp. II

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[8] In 1961, Congress enacted 8 U.S.C. 1105a(a), which provided that the court-of-appeals review procedures of the Hobbs Act, 28 U.S.C. 2341-2351, "shall be the sole and exclusive procedure for[] the judicial review of all final orders of deportation." Congress enacted Section 1105a(a) because it was dissatisfied with the bifurcated system of review that resulted from this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955), permitting aliens to proceed in district court. See H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22, 27-28 (1961). As this Court observed in *Foti* v. *INS*, 375 U.S. 217, 224 (1963), "[t]he fundamental purpose behind [placing exclusive review in the courts of appeals] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." See also *Stone* v. *INS*, 514 U.S. 386, 399 (1995).

1996) for all cases in the future. And, to ensure that those exclusive-review procedures would not be circumvented, Congress enacted Section 1252(g), which provides that "notwithstanding any other provision of law," no judicial review of any claim arising out of deportation proceedings may be had except under the procedures established in the INA itself.

These consistent and successive enactments show that Congress has required that judicial review of deportation orders be had, if at all, only in the courts of appeals. The court of appeals concluded in this case, however, that Congress has not acted with sufficient clarity to prevent aliens from collaterally challenging their deportation orders in the district courts under 28 U.S.C. 2241. The result of that decision is that *criminal* aliens may proceed in district court under 28 U.S.C. 2241 to test the validity of their deportation orders, whereas all other aliens must file petitions for review in the court of appeals, pursuant to the INA's exclusive-review procedures. That result not only frustrates Congress's intent that review of criminal aliens' deportation proceedings be streamlined and limited; it turns Congress's scheme on its head. It is scarcely conceivable that Congress would have intended criminal aliens to have *greater* opportunities for judicial review (and delay) of their deportation orders than all other aliens. Cf. *Foti* v. *INS*, 375 U.S. 217, 224 (1963) (noting Congress's concern with delays in judicial review of deportation orders); *Stone* v. *INS*, 514 U.S. 386, 399 (1995) (similar). But inevitably, permitting criminal aliens to proceed in district court under 28 U.S.C. 2241 would make the entire process of judicial review of those aliens' deportation orders longer than the process of reviewing non-criminal aliens' deportation orders.[9]

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[9] As we explain in greater detail in our petition for a writ of certiorari in *Magana-Pizano* (at 22-23), aliens proceeding in district court pursuant

b. The court of appeals' decision, moreover, rests on a faulty but significant premise, namely, that Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA prevent criminal aliens from raising any claim of any kind on a petition for review in the courts of appeals. See App. 13a-15a. Because the court believed that criminal aliens were altogether barred from proceeding in the courts of appeals, it expressed concern that, absent judicial review of deportation orders under 28 U.S.C. 2241, those aliens would have no access to judicial review at all—a situation that, it believed, would raise serious constitutional concerns under Article III and the Suspension of Habeas Corpus Clause, Art. I, § 9, Cl. 2. See App. 19a-20a, 28a-30a.

AEDPA Section 440(a) amended 8 U.S.C. 1105a(a)(10) (1994) to provide that orders of deportation against aliens convicted of certain criminal offenses "shall not be subject to review by any court." IIRIRA Section 309(c)(4)(G) further provides that "there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed" the same kinds of criminal offenses. Those provisions—and the parallel provision in 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996) applicable to cases commenced after April 1, 1997—do not, however, withdraw *all* power

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to 28 U.S.C. 2241 would have markedly greater opportunities for delay than those proceeding directly in the courts of appeals. Section 2241 contains no express time limit on the filing of a petition for a writ of habeas corpus, in contrast with the strict time limits governing the exclusive-review procedures of the INA. See 8 U.S.C. 1252(b)(1) (Supp. II 1996); 8 U.S.C. 1105a(a)(1) (1994) (repealed 1996). Also, unlike the INA, 28 U.S.C. 2241 does not require consolidation of challenges to initial deportation orders with challenges to denials of motions to reopen or reconsider. Cf. 8 U.S.C. 1252(b)(6) (Supp. II 1996). And, of course, an alien who was unsuccessful in district court could appeal to the court of appeals, and thereby obtain further delay.

from the courts of appeals to review deportation orders entered against such aliens.[10]

First, consistent with the general rule that a court has jurisdiction to determine its own jurisdiction, a court of appeals may entertain a petition for review to the extent that the petitioner contends that he does not fall within the category of aliens for whom judicial review is precluded—*e.g.*, to review a contention that the petitioner is not an alien, that he was not convicted of the offense that formed the basis of the deportation order, or that that offense is not one for which judicial review is barred by Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA. See *Magana-Pizano* v. *INS*, 152 F.3d at 1216; *Ter Yang* v. *INS*, 109 F.3d 1185, 1192 (7th Cir.), cert. denied, 118 S. Ct. 624 (1997); *Coronado-Durazo* v. *INS*, 123 F.3d 1322 (9th Cir. 1997) (petition for rehearing pending); but see *Berehe* v. *INS*, 114 F.3d 159, 161 (10th Cir. 1997) (concluding that IIRIRA Section 309(c)(4)(G) does not permit review of deportability).

Second, those provisions do not, in our view, withdraw the well-established authority of the courts of appeals to entertain a constitutional challenge to a provision of the INA itself, which the BIA has no authority to resolve. See *Magana-Pizano* Pet. 18-19. Compare *Johnson* v. *Robison*,

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[10] Although AEDPA Section 440(a) and IIRIRA Section 309(c)(4)(G) are applicable only to judicial review of immigration proceedings commenced before April 1, 1997, their permanent replacement, 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996), is substantively similar. Thus, courts in the future are likely to construe Section 1252(a)(2)(C) in light of the courts' construction of its predecessor provisions, just as they have issued conforming constructions of AEDPA Section 440(a) and IIRIRA Section 309(c)(4)(G). See App. 2a, 10a (relying on *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996), and *Santos* v. *INS*, 124 F.3d 64 (1st Cir. 1997)); *Magana-Pizano* v. *INS*, 152 F.3d at 1216 (relying on *Ter Yang* v. *INS*, 109 F.3d 1185, 1192 (7th Cir.), cert. denied, 118 S. Ct. 624 (1997), and *Duldulao* v. *INS*, 90 F.3d 396 (9th Cir. 1996)).

415 U.S. 361, 373-374 (1974). The court of appeals therefore would have jurisdiction to entertain respondent's contention that Section 1182(c), as amended by Section 440(d) of AEDPA, violates the equal protection component of the Fifth Amendment's Due Process Clause to the extent it bars relief to criminal aliens in deportation proceedings but not to those returning from a temporary trip abroad.

In fact, in the new 8 U.S.C. 1252(b)(9) (Supp. II 1996), entitled "CONSOLIDATION OF QUESTIONS FOR JUDICIAL REVIEW," Congress specifically provided that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions," arising from proceedings to remove an alien from the United States "shall be available only in judicial review of a final order under this section"—*i.e.*, only in the court of appeals. In a case such as this, then, a criminal alien's constitutional challenge to a provision of the INA must be considered by the court of appeals together with any statutory claim the petitioner has that may still be considered by the court of appeals (see p. 19, *supra*). Although Section 1252(b)(9) does not apply of its own force to cases commenced before April 1, 1997, it nevetheless reinforces the conclusion that under the statutory framework in effect both before and after IIRIRA, constitutional challenges are to be heard in the court of appeals, where all legal challenges to deportation orders are to be consolidated, not in a separate habeas corpus proceeding in the district court. Thus, while there is no doubt that Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA were intended to restrict the courts of appeals' authority to review the merits of deportation orders entered against criminal aliens, a criminal

alien may, as before, raise a constitutional challenge to a provision of the INA itself in the court of appeals.[11]

Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA do not, however, permit a court of appeals to consider the particular non-constitutional claim made by respondent here—namely, that the Attorney General misconstrued AEDPA Section 440(d) in concluding that he is not eligible for discretionary relief from deportation under Section 1182(c). That statutory claim does not go to the question whether the preclusions of judicial review in AEDPA Section 440(a) and IIRIRA Section 309(c)(4)(G) apply, and it therefore is not within the jurisdicton of the court of appeals to determine its own jurisdiction. Nor could that claim be presented to the district court, for Congress's decision to channel all judicial review into the courts of appeals—as reflected by 8 U.S.C. 1105a (as amended by AEDPA Section 440(a)) and 8 U.S.C. 1252(g) (Supp. II 1996)—prevents the district court from exercising jurisdiction (whether under the habeas corpus statute or otherwise) to entertain challenges to deportation proceedings.

The withdrawal of the courts' authority to hear that particular claim, however, raises no constitutional concerns, for (as we explain further in our petition in *Magana-Pizano*, at 20-21), that claim goes not to respondent's deportability, but rather to whether respondent will be granted discretionary *relief* from deportation, comparable to "'the President's power to pardon a convict.'" *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (quoting *Jay* v. *Boyd*, 351 U.S. 345, 354

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[11] Because the courts of appeals remain available to consider such a constitutional challenge, the bar to such challenges in the district court, whether in habeas corpus proceedings or otherwise, is "unquestionably constitutional." See *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975); see also *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977) (Congress may substitute alternative review procedures in place of habeas corpus).

(1956)). That claim therefore does not fall within whatever scope of the habeas corpus remedy is preserved by the Suspension Clause. Thus, the court of appeals' concern that there would not otherwise be a judicial forum for the claim should not have led the court to hold that 28 U.S.C. 2241 remains available as a vehicle to consider it.[12]

c. The court of appeals' conclusion that Congress did not intend to foreclose habeas corpus review under 28 U.S.C. 2241 for criminal aliens challenging their deportation orders conflicts with the Ninth Circuit's decision in *Hose* v. *INS*, 141 F.3d 932 (1998) (petition for rehearing pending). In *Hose*, the court concluded that the "notwithstanding" clause of Section 1252(g) had, in fact, forfended aliens' access to habeas corpus remedies under 28 U.S.C. 2241.[13] As that court noted:

> [The] language [in Section 1252(g)] is clear. Except as provided in section 1252, federal courts are divested of all jurisdiction to hear any claim by any alien involving an immigration proceeding. * * * Section 1252 does not

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[12] Even if a judicial forum were constitutionally required for this aspect of respondent's effort to seek discretionary relief from his conceded deportability, at a minimum the court of appeals should have held that that claim should be addressed in the court of appeals on petition for review, and not in the district court in habeas corpus proceedings. Such a construction of Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA would be far more harmonious with Congress's general design than is the result reached by the court of appeals, permitting respondent to proceed in district court. Cf. *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act the most harmonious, comprehensive meaning possible in light of the legislative policy and purpose.") (internal quotation marks omitted).

[13] In *Magana-Pizano*, 152 F.3d at 1220, the Ninth Circuit subsequently concluded that that deprivation of a judicial forum under 28 U.S.C. 2241 was unconstitutional in the case of a criminal alien who (it believed) would have no other judicial forum for any of his claims.

> give the district court jurisdiction to hear Hose's [Section 2241] habeas petition. Not having been granted jurisdiction under section 1252, that jurisdiction is removed just as the statute says it is.

141 F.3d at 935. The Ninth Circuit expressly disagreed (*ibid.*) with the court of appeals' holding in this case (which, it stated, was "contrary to the clear language" of Section 1252(g)) and with the Second Circuit's similar decision in *Jean-Baptiste* v. *Reno*, 144 F.3d 212, 218-220 (1998) (petition for rehearing pending). That divergence of views among the courts of appeals about such an important matter as the continued availability of a habeas corpus remedy under 28 U.S.C. 2241 warrants this Court's review.[14]

The importance of this case is underscored by the large number of aliens nationwide who are in a situation similar to respondent's. Approximately 466 petitions for review have been filed in the courts of appeals and 376 petitions for a writ of habeas corpus have been filed in the district courts in which criminal aliens have challenged the BIA's denial of Section 1182(c) relief to them based on the application of Section 440(d) of AEDPA. In addition, there are about 2600 administrative cases still pending in which the issue of the temporal scope of Section 440(d) may be dispositive of the alien's deportation proceeding, and about 5400 others in which the BIA has dismissed an alien's appeal based on *Soriano*. Many of those aliens might seek habeas corpus review, since there is no express time limitation for doing so. See note 9, *supra*. We have been further informed that there are currently approximately 23,000 removable aliens

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[14] The Seventh Circuit has also suggested that Section 1252(g) "abolishes even review under § 2241, leaving only the constitutional writ [of habeas corpus] unaided by statute." *Ter Yang* v. *INS*, 109 F.3d at 1195. Elsewhere, however, it has suggested that review under Section 2241 might remain available. *Turkhan* v. *INS*, 123 F.3d 487, 490 (7th Cir. 1997).

held in federal prisons and 54,000 removable aliens incarcerated in state prisons. Once those aliens are placed in removal proceedings, many of them may claim, as respondent has claimed in this case (and Magana-Pizano has claimed in his) that neither AEDPA nor IIRIRA is applicable to their cases (because their applications were filed or convictions were entered before the effective dates of AEDPA and IIRIRA), and so their eligibility for discretionary relief should be judged under pre-AEDPA law. Review in this case would resolve whether (and if so where) they may bring such a claim.[15]

2. a. Certiorari is also warranted to review the court of appeals' holding on the merits that Section 440(d) of AEDPA does not render ineligible any alien who applied for Section 1182(c) relief before the date of AEDPA's enactment. As noted above, that issue is currently being litigated in hundreds of cases, in every circuit but one, and in thousands of administrative proceedings. Our position, as we have explained, is that neither the courts of appeals nor the district courts have jurisdiction to review that claim. But if we are wrong on the jurisdictional issue, then this Court's resolution of the merits is needed so that the Attorney General—and the lower courts that would then consider such claims—will know definitively whether the Attorney General must

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[15] Even aliens convicted in the future of criminal offenses and deportable on that ground may be affected by this case. Such criminal aliens who are ineligible for cancellation of removal under 8 U.S.C. 1229b (Supp. II 1996) may nonetheless seek to raise constitutional and other challenges to their orders of removal. Because, as we have explained (note 10, *supra*), courts are likely to construe the jurisdiction-limiting provisions applicable to criminal aliens in new Section 1252(a)(2)(C) in conformity with judicial constructions of Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA, it is likely that criminal aliens in the future, if allowed to do so, will proceed in district court under 28 U.S.C. 2241 rather than in the court of appeals.

adjudicate thousands of applications for discretionary relief filed by criminal aliens in deportation proceedings.

More generally, the court of appeals' conclusion that Section 440(d) implicates the presumption against retroactivity may have far-reaching ramifications for treatment by the Attorney General of legislative changes in the standards for relief from deportation, and indeed deportability. Under the court of appeals' reasoning, any change made by Congress in the standards governing an alien's ability to remain in this country must, presumptively, not be applied to pending cases, because such a change would be "substantive" and therefore impermissibly "retroactive." App. 43a. This view, however, is at odds with the courts' traditional understanding of deportation as inherently prospective, in that it concerns the alien's right to remain in the country. Thus, in *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), this Court explained that "[t]he deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain." Congress's views respecting aliens have changed over time, and it has modified the deportation laws accordingly; the court of appeals' decision in this case would presume that no such modifications may be applied to pending cases—or even, perhaps, to any past conduct.

Other courts of appeals have concluded, contrary to the First Circuit in this case, that legislative changes affecting the Attorney General's discretionary authority to grant relief from deportation are not properly characterized as retroactive, because they have "only a prospective impact." *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996). Thus, all the courts of appeals that considered the issue (including the First Circuit) concluded that the Immigration Act of 1990, which disqualified aggravated felons who had served five years in prison from Section 1182(c) relief, was to

be applied to aliens who had already been convicted of aggravated felonies.[16] Although those courts relied in part on particular indications in the 1990 Act that Congress intended it to apply regardless of the date of the alien's conviction, they also emphasized that the 1990 Act did not implicate the presumption against retroactivity at all, because "'Congress did not attach additional consequences [to past criminal activity] but merely withdrew a previously available form of discretionary relief.'" *Scheidemann*, 83 F.3d at 1523 (quoting *De Osorio* v. *United States INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)). The court of appeals' decision in this case is in marked contrast to those decisions, and raises the important and recurring issue of how the Attorney General may reasonably construe the scope of legislative changes in standards governing deportation and relief from deportation.

b. The court of appeals' analysis of AEDPA Section 440(d)'s application to this case was seriously flawed. The court of appeals observed that, in Sections 413 and 421 of AEDPA, Congress expressly provided that provisions making alien terrorists ineligible for certain forms of relief should be applied to pending cases; the court inferred from those provisions that Congress did not intend that Section 440(d) be so applied. App. 44a-51a. The court did not, however, address the fact that, in at least three other sections of Title IV of AEDPA, including the closely neighboring Section 440(f), Congress also provided that particular amendments would *not* apply to pending applications or pre-enact-

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[16] See Immigration Act of 1990, Pub. L. No. 101-649, § 511(a), 104 Stat. 5052, as amended by Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1751; *Scheidemann*, 83 F.3d at 1523; *Samaniego-Meraz* v. *INS*, 53 F.3d 254, 256 (9th Cir. 1995); *Asencio* v. *INS*, 37 F.3d 614, 616-617 (11th Cir. 1994); *De Osorio* v. *United States INS*, 10 F.3d 1034, 1038-1042 (4th Cir. 1993); *Buitrago-Cuesta* v. *INS*, 7 F.3d 291, 295 (2d Cir. 1993); *Barreiro* v. *INS*, 989 F.2d 62 (1st Cir. 1993).

ment events. See AEDPA § 435(b), 110 Stat. 1275; § 440(f), 110 Stat. 1278; § 441(b), 110 Stat. 1279. The most that one can say about the text of AEDPA is that there is no clear pattern demonstrating that Congress intended the amendments made by Title IV to apply only to post-enactment cases unless otherwise stated.[17]

Because the text of the amendment to 8 U.S.C. 1182(c) made by Section 440(d) of AEDPA does not yield an unambiguous expression of congressional intent that it does not apply to those criminal aliens who happened to have filed applications before AEDPA was enacted, the court of appeals should have deferred to the Attorney General's conclusion in *Soriano* that aliens who had not already been granted relief under Section 1182(c) when AEDPA was enacted are ineligible to receive it. See *Chevron*, 467 U.S. at 843; 8 U.S.C. 1103(a)(1) (Supp. II 1996) (vesting the Attorney General with authority to interpret the INA).

The Attorney General's statutory interpretation is plainly reasonable and consistent with Congress's purposes in enacting AEDPA. As the Attorney General explained in *Soriano*, the amendment made by Section 440(d) does not implicate the presumption against retroactivity because it

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[17] The court of appeals also relied (App. 52a-53a) on a predecessor to Section 440(d) passed by the Senate, which would have directed (at Section 303(f)) that the amendments be applied to all pending cases. That temporal-scope provision did not survive the House-Senate conference, and the court of appeals inferred from that fact that the conference intentionally dropped the provision because it wanted the amendments to apply only prospectively. But since, in the final version of AEDPA, Congress expressly provided *both* that certain provisions of Title IV be applied prospectively only *and* that certain others be applied to pending cases, one can draw no firm conclusion from the fact that Congress dropped the Senate's temporal-scope provision. Indeed, the conference report indicates only that the House *receded* to the Senate-bill predecessor of Section 440(d) because it "enhance[d] the ability of the United States to deport criminal aliens." H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 119 (1996).

operates only prospectively to deny criminal aliens a form of relief from deportation that would allow them to remain in the country in the future, and because it operates to remove a class of cases from her jurisdiction under Section 1182(c). App. 133a. In addition, the enactment of Section 440(a) along with Section 440(d) demonstrates that Congress was particularly concerned about the large number of deportable criminal aliens in the United States, and sought to limit their opportunities for relief and to accelerate their removal. See also S. Rep. No. 48, 104th Cong., 1st Sess. 3-4 (1995) (recommending measures to that effect); H.R. Rep. No. 22, 104th Cong., 1st Sess. 6-9 (1995) (similar). The Attorney General's decision in *Soriano*, therefore, gives full effect to the legislative purposes underlying Section 440(d) and should not have been disturbed.

3. For the reasons given above, the court of appeals' rulings on both jurisdiction and the merits raise issues of substantial and recurring importance in the Attorney General's administration of the immigration laws. Review by this Court therefore is warranted.

On November 4, 1998, this Court heard oral argument in *Reno* v. *American-Arab Anti-Discrimination Committee* (*AADC*), No. 97-1252, which also concerns whether the district courts retain any jurisdiction to review deportation matters after AEDPA and IIRIRA, and specifically concerns the scope of 8 U.S.C. 1252(g) (Supp. II 1996). *AADC* does not, however, directly involve the continued availability of the writ of habeas corpus or any question arising under the Suspension of Habeas Corpus Clause.[18] Nor does it involve the second question presented in this case: whether the Attorney General must adjudicate the applications filed by thousands of criminal aliens for discretionary relief under

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[18] We discuss the habeas corpus issue in our opening brief (at 25-26 n.12, 45 n.20) in *AADC*.

Section 1182(c). The widespread and disruptive litigation on both the habeas corpus issue and the Section 1182(c) issue in the lower courts has delayed the deportation of thousands of criminal aliens. A decision by the Court this Term that resolves that litigation is important for the sound and expeditious administration of the immigration laws that Congress intended when it enacted AEDPA and IIRIRA. We therefore suggest that the Court not hold the petition in this case pending its decision in *AADC*, so that the Court will be in a position to render a definitive decision this Term on the questions presented in this case if its decision in *AADC* does not absolutely foreclose adjudication of claims such as respondent's here—a challenge to the denial of his application for discretionary relief from his conceded deportability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 98 835

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

RAUL PERCIRA GONCALVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Appendix A (court of appeals' opinion, May 15, 1998)	1a
Appendix B (order of the immigration judge, Jan. 20, 1995)	59a
Appendix C (oral decision of the immigration judge, Jan. 20, 1995)	62a
Appendix D (decision of the Board of Immigration Appeals, Mar. 24, 1997)	73a
Appendix E (memorandum order of the district court, August 14, 1997)	75a
Appendix F (order of dismissal of the district court, August 14, 1997)	78a
Appendix G (court of appeals' order denying rehearing, July 31, 1998)	79a
Appendix H (constitutional and statutory provisions involved)	81a
Appendix I (decision of Board of Immigration Appeals in *In re Soriano*, June 27, 1996)	91a
Appendix J (order of Attorney General vacating BIA decision in *In re Soriano*, Sept. 12, 1996)	124a
Appendix K (decision of the Attorney General in *In re Soriano*, Feb. 21, 1997)	125a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1953

RAUL PEREIRA GONCALVES, PETITIONER, APPELLANT

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES; DORIS MEISSNER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; STEVE FARQUHARSON, INS DISTRICT DIRECTOR, BOSTON DISTRICT; DEPARTMENT OF JUSTICE; AND IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS, APPELLEES

[Heard: Jan. 9, 1998
Decided: May 15, 1998]

Before: STAHL, Circuit Judge, CAMPBELL, Senior Circuit Judge, and LYNCH, Circuit Judge.

LYNCH, Circuit Judge.

Raul Goncalves has been a permanent resident alien for twenty-five years, ever since he arrived in the United States at the age of three, and now is subject to deportation because he has committed crimes of moral turpitude such as theft, possession of marijuana and the like. He filed an application in 1994 for discretionary relief from deportation with the immigration authori-

ties under § 212(c) of the Immigration and Nationality Act (INA), as the law permitted him to do.

While Goncalves' application was still pending, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which, at § 440(d), restricted the availability of discretionary relief. The question then arose as to whether Congress intended these restrictions to apply retroactively. The Board of Immigration Appeals (BIA) said that Congress did not intend the restrictions to be fully retroactive, and that at least those aliens whose applications were pending on the date of AEDPA's enactment, like Goncalves, could continue to pursue their applications for relief. The Attorney General disagreed, reversed the BIA, and required the dismissal of all pending applications for § 212(c) relief (even appeals from cases where immigration judges had said relief should be granted). As a result, Goncalves' application was dismissed without being heard by the BIA and he was taken into custody by federal officials.

Goncalves filed a petition for habeas corpus in the district court, rather than filing for direct review in this court. This he was required to do by the precedent of this court. *See Kolster v. INS*, 101 F.3d 785 (1st Cir. 1996). The district court dismissed the petition, finding the Attorney General, and not the BIA, was correct in the interpretation of the statute.

Goncalves appealed, raising pure issues of law, including a challenge to the Attorney General's interpretation of the statute and constitutional claims. The Attorney General defends on two fronts. Goncalves

filed in the wrong court, she says. He should have filed in the court of appeals, he missed the deadline to do so, and so the case must be dismissed. In fact, she says, Congress sub silentio stripped the district courts of their traditional habeas jurisdiction under 28 U.S.C. § 2241 to hear claims of the type Goncalves asserts. Secondly, she says, no court may review her decision as to whether Congress intended the restrictions in AEDPA § 440(d) to apply to pending applications. Congress exempted her decision from any judicial review when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, Div. C., 110 Stat. 3009-546 (enacted Sept. 30, 1996). In any event, she argues, her decision is entitled to deference. We find the Attorney General's arguments unpersuasive and agree that Goncalves may still pursue his claim for § 212(c) relief. We reverse and remand this case to the BIA.

A summary of our reasoning may be helpful. This case presents two sets of major issues. The first is which federal court, if any, has jurisdiction to hear Goncalves' claims. We conclude that Congress has divested the United States Courts of Appeals of their former statutory jurisdiction to hear such cases on direct review of the administrative agency's decision. We further conclude, following *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L.Ed.2d 827 (1996), that Congress neither explicitly nor by implication repealed the grant of jurisdiction in 28 U.S.C. § 2241 to issue writs of habeas corpus to persons in federal custody which the federal district courts have had since 1789 and which has always been available in immigration cases.

If there is jurisdiction, we ask whether Congress intended nevertheless to restrict the scope of review to preclude review of Goncalves' claims. To the extent that Congress intended to narrow the scope of review of discretionary decisions by the administrative agency, we note that this case does not involve any such exercise of discretion, but rather concerns a pure issue of law. That pure issue of law, of whether Congress intended to make a particular provision of a statute retroactive, is of a type traditionally resolved by the courts. We discern no intent by Congress to restrict the scope of judicial review of that question. Our conclusion avoids the need to reach novel and complex constitutional issues under the Suspension Clause, Article III, the Due Process Clause and the Equal Protection Clause.

The second major set of issues addresses the merits: is the Attorney General correct in her interpretation that AEDPA § 440(d), as amended by IIRIRA, eliminates eligibility for § 212(c) relief retroactively for aliens convicted of crimes involving moral turpitude? We analyze the question under *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994), and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S. Ct. 1871, 138 L.Ed.2d 135 (1997), cases concerning the temporal application of new statutes. We conclude, contrary to the Attorney General, that Congress did not intend its new provisions restricting such discretionary relief to apply retroactively. The statute's text reveals numerous instances where Congress used explicit language to make its new restrictions apply retroactively; for example, it used such language with respect to alien terrorists. But

there is no such explicit text as to aliens in Goncalves' position.

We check our interpretation of the text against the legislative history to ensure we have not gone astray. That history shows three things. First, Congress expressly considered a provision which would have explicitly made the new restrictions on § 212(c) relief applicable retroactively and chose not to enact that provision. Second, Congress was keenly aware of the problem of whether restrictions on relief should apply retroactively. Third, Congress enacted IIRIRA against the backdrop of an administrative ruling by the BIA that the restrictions on § 212(c) relief for aliens convicted of crimes involving moral turpitude, contained in AEDPA § 440(d), was not fully retroactive and did *not* apply to pending applications. In the face of that ruling, the same Congress that had enacted AEDPA chose, in IIRIRA, not to amend AEDPA explicitly to provide that the AEDPA § 440(d) restrictions applied retroactively. It made that choice even though, in IIRIRA § 306, it amended AEDPA § 440(d), the very subsection at issue, in other respects. We therefore conclude that the BIA is required to *consider* Goncalves' application for § 212(c) relief from deportation. Whether the immigration authorities grant or deny that application, is, of course, within their discretion.

I. Facts and Procedural History

Raul Percira Goncalves is a lawful permanent resident of the United States. He committed a series of thefts, he says while under the influence of alcohol, and was incarcerated. He has been convicted of charges of breaking and entering, larceny, possessing burglary

tools, receiving stolen property, and one charge of possession of marijuana. Those non-violent offenses, Goncalves conceded, are crimes "involving moral turpitude" and subjected him to deportation. *See* Immigration and Nationality Act (old INA) § 241(a)(2)(A)(ii), House Judiciary Comm. Print, 104th Cong., 1st Sess. (10th ed.1995) (reflecting laws enacted as of May 1, 1995), now renumbered as INA § 237(a)(2)(A)(ii) and codified at 8 U.S.C.A. § 1227(a)(2)(A)(ii) (West Supp. 1998)[1] ("Any alien who at any time after entry is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct . . . is deportable."). On his release from prison in May of 1994, he was taken into custody for deportation, although he was released on bail while his petition was pending before the INS. In the interim he attended meetings of Alcoholics Anonymous. He has since earned his high school equivalency diploma, married, had a child, and been gainfully employed.

At the time the deportation proceedings against him commenced, Goncalves was eligible to apply to the Attorney General for a discretionary waiver of deportation. That is because he was a lawful permanent resident, had seven years of "lawfully unrelinquished domicile" and the crimes he committed were not "aggravated" felonies. *See* old INA § 212(c); *see also*

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[1] Citation to "INA" refers to the INA as currently in effect, whether or not the specific provision has been changed by AEDPA or IIRIRA. For ease of reference, we provide parallel citations to the current version of the United States Code Annotated. Citation to "old INA" refers to the INA as in effect on May 1, 1995, as set forth in the tenth edition of House Judiciary Committee's publication of the statute, i.e., as in effect prior to the amendments wrought by AEDPA and IIRIRA.

Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (§ 212(c) relief is available in deportation as well as exclusion proceedings); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976) (adopting *Francis* decision nationwide). He had no right to remain in this country, but he was entitled by § 212(c) to apply for a waiver of deportation and ask the Attorney General, in the exercise of her discretion, to allow him to remain here.

Goncalves applied for § 212(c) relief in September 1994. Under the law in effect in 1994, an alien applying for a waiver first presented his case to an Immigration Judge (IJ), as Administrative Law Judges are known in the INS's Executive Office for Immigration Review. The IJ was required to balance the positive and adverse factors in determining whether a waiver was warranted, and to justify his or her decision, whether in favor or against granting a waiver, to allow review by the BIA and the courts. *See Matter of Marin*, 16 I. & N. Dec. 581, 585, 1978 WL 36472 (BIA 1978) (listing factors). The IJ agreed that Goncalves was statutorily eligible to apply for § 212(c) relief but Goncalves failed to convince the IJ that he was worthy of it. On Jan. 20, 1995 the IJ denied his application and Goncalves took a timely appeal. And there the case sat for more than two years, undoubtedly because of the very large number of cases that were pending before the Board. *See* H.R. Rep. No. 104-469, pt. 1, at 119 (1996) (noting that over 17,000 aliens filed appeals to the BIA in 1995).

The BIA never reached the merits of Goncalves' application. On March 24, 1997, the BIA dismissed Goncalves' appeal on the grounds that he was no longer statutorily eligible for § 212(c) relief, as a result of enactment of AEDPA in the interim. The BIA was

compelled to do so by the decision of the Attorney General in *Matter of Soriano*, Int. Dec. 3289, 1996 WL 426888 (Op. Att'y Gen. June 27, 1996) (beginning at *16). The Attorney General's decision in *Soriano* concluded that Congress intended to make the new restrictions on § 212(c) relief contained in AEDPA § 440(d) retroactive and that the new restrictions should be applied even to those applications filed before the date of AEDPA's enactment. *Soriano* required the dismissal of all such pending applications, even if the alien's application had been granted by the IJ and the case was pending on appeal. The Attorney General's *Soriano* decision reversed an earlier opinion by the BIA, sitting en banc, that found no congressional intent to apply the new restrictions to pending applications, and so would have permitted Goncalves' appeal to be heard on the merits.

Because his application had been dismissed, Goncalves was taken back into federal custody on June 25, 1997 for deportation. On August 8, 1997, Goncalves filed a petition for habeas corpus relief in the United States District Court for the District of Massachusetts. Goncalves' petition asserted that Congress did not intend AEDPA § 440(d) to apply retroactively, or at the very least that Congress did not intend to disrupt pending applications for relief. Goncalves also challenged, as a violation of the Equal Protection Clause, the government's decision to apply the statutes in a manner which made the availability of discretionary relief dependent on whether an alien was in deportation proceedings, as Goncalves was, or in exclusion proceedings, as Goncalves would have been if he had taken

a brief trip abroad.[2] The district court dismissed Goncalves' petition for a writ of habeas corpus on August 14, 1997. On August 26, 1997, this court granted Goncalves' motion to stay deportation and for expedited consideration of his appeal. Goncalves has been in federal custody since June 25, 1997. He was thus in custody when his petition was filed and has apparently remained in custody throughout these habeas proceedings.

II. Statutory Background

In order to understand the issues presented by this case, we outline some of the recent changes to our immigration laws. In the interim two years between the IJ's denial of Goncalves' application for a discretionary waiver of deportation and the BIA's dismissal of his application, Congress substantially altered the immigration landscape by enacting two significant statutes, AEDPA and IIRIRA.

On April 24, 1996, Congress enacted AEDPA, which, at § 440(d), greatly expanded the category of criminal convictions that would render an alien ineligible to

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[2] The BIA has interpreted AEDPA § 440(d) as precluding relief only in deportation proceedings, not in exclusion proceedings. *See Matter of Fuentes-Campos*, Int. Dec. 3318, 1997 WL 269368 (BIA May 14, 1997). Although IIRIRA has abolished this distinction by combining the two into a new proceeding known as a "removal proceeding," this change does not affect aliens subject to the "transitional rules." Relying on *Francis*, *supra*, Goncalves argues that there is no rational basis for making the availability of discretionary relief depend on the distinction between these two forms of proceedings. We express no view on the merits of this argument.

apply for § 212(c) relief. Although AEDPA § 440 contained an express "effective date" provision, that provision by its terms applied only to § 440(e) (expanding INA definition of "aggravated felony"), and not to § 440(d), the subsection which concerns us.

Additionally, AEDPA § 440(a) eliminated statutory review pursuant to the APA in the U.S. Courts of Appeals for some categories of deportation cases. In cases involving denial of an application for discretionary waiver by an alien deportable by reason of commission of aggravated felonies, this court held in *Kolster*, *supra*, that Congress had eliminated the statutory grant of jurisdiction in the courts of appeals over such claims. *Kolster* also held that this posed no constitutional problems because residual jurisdiction existed in the district courts over habeas corpus petitions. That holding was consistent with the position taken by the INS; indeed, the INS conceded that there would be some form of habeas jurisdiction in the district court. *Kolster* expressly reserved issues concerning the source of this habeas jurisdiction and the scope of habeas review. *See id.* at 790 n. 4 & 791. It was in apparent reliance on the *Kolster* case and this court's subsequent decision in *Santos v. INS*, 124 F.3d 64 (1st Cir. 1997) (rejecting INS claim that, after passage of IIRIRA, petition for review in court of appeals, rather than petition for a writ of habeas corpus, was the proper forum to raise a jurisdictional or constitutional challenge to an order of deportation), that Goncalves filed his petition for habeas corpus in the district court.

Within a short time Congress changed some of the rules established by AEDPA. On September 30, 1996, Congress enacted IIRIRA. Under IIRIRA there are

two new sets of rules: the new permanent rules and the "transitional rules." *See* IIRIRA § 309(c), as amended by Act of Oct. 11, 1997, § 2, Pub.L. No. 104-302, 110 Stat. 3656, 3657. As made clear by the technical amendments, the new permanent rules under IIRIRA are effective for cases in which the INS instituted removal proceedings on or after April 1, 1997. *See id.* In contrast, the transitional rules are to be applied to deportation proceedings which were commenced before April 1, 1997. Because Goncalves' deportation was initiated before April 1, 1997, his claims are governed by the transitional rules, as both the Attorney General and Goncalves agree.

Goncalves' petition, governed by the transitional rules,[3] raises pure issues of law. The first is whether, under the transitional rules, Congress intended for jurisdiction over this case to be vested, if indeed in any

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[3] The new permanent rules nevertheless have some relevance. Under the permanent rules, Congress allowed a new form of discretionary relief from deportation for those aliens convicted of crimes, but limited this new relief to a smaller category of aliens than had historically been eligible (pre-AEDPA) to seek § 212(c) relief. IIRIRA § 304, adding new INA § 240A, codified at 8 U.S.C.A. § 1229b (West Supp.1998), consolidates "suspension of deportation" relief and aspects of the former § 212(c) relief into a new form of relief called "cancellation of removal." "Cancellation of removal" relief restores discretionary relief for aliens who are deportable because they have committed two or more crimes involving moral turpitude under INA § 237(a)(2)(A)(ii). Thus, if Goncalves had been charged with deportability on this ground after April 1, 1997, he would have been permitted to apply for this new form of relief. "Cancellation of removal" relief, like § 212(c) relief before AEDPA, is available for all aliens whose criminal convictions do not qualify as "aggravated felonies." *See* IIRIRA § 304(a) (adding new INA § 240A).

court, in the court of appeals, as the Attorney General argues, or in the district court on petition for habeas corpus, as Goncalves argues. We pause to note that the position taken by the Attorney General now is the opposite of the position she took in *Kolster*.[4] If the Attorney General is correct, then, she argues, Goncalves loses his case because he did not file a petition with this court within the thirty day period of time allotted.[5]

If Goncalves is correct, there is no time limitations problem, but there is a different problem. We must look at whether Goncalves may raise on habeas the type of statutory claim he now makes: that as a pure issue of law, the Attorney General is mistaken in her conclusion that Congress intended its restrictions of § 212(c) relief to apply retroactively. If there was jurisdiction over such a claim, then we must review de

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[4] The Attorney General has reversed her position on which court has jurisdiction because of her interpretation of the judicial review provisions of IIRIRA, which we discuss below.

[5] Of course, this court's *Kolster* and *Santos* decisions, and petitioner's apparent reliance on those decisions, complicate any use of the thirty day limit to dismiss Goncalves' case. Even if we to were reverse *Kolster* and hold that Goncalves could have presented his claims on direct review in this court, a substantial question would remain as to whether we would apply the thirty day limit for filing to Goncalves. A long line of Supreme Court cases, beginning with *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971), has refused to apply newly-specified statutes of limitations retroactively to bar suits that, under controlling precedent, were filed in a timely manner. *See also American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 110 S. Ct. 2323, 110 L.Ed.2d 148 (1990); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S. Ct. 2022, 95 L.Ed.2d 582 (1987). Thus, it is likely we would have to reach the merits of this case in any event.

novo the district court's determination that the Attorney General's decision is correct.

III. Jurisdiction

A. Jurisdiction in the Court of Appeals

The Attorney General argues that Goncalves should have presented any claims that he could have made in a petition for review to this court within thirty days of the INS's final decision, and that he is therefore precluded from making such claims on habeas. The short answer is that this argument is foreclosed by *Kolster*, and that any argument that IIRIRA requires us to reconsider *Kolster* is foreclosed by *Santos*. However, as this court did not fully explain its reasoning in *Santos*, and the Attorney General continues to press this argument, we explain why Goncalves could not have filed a petition for review in this court.

We start with the language of the transitional rules provisions of the statute, for the general rule is that "'[c]ourts created by statute can have no jurisdiction but such as the statute confers.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818, 108 S. Ct. 2166, 2179, 100 L.Ed.2d 811 (1988) (quoting *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850)). IIRIRA § 309(c)(1), as amended by Act of Oct. 11, 1997, § 2, Pub. L. No. 104-302, 110 Stat. 3656, 3657, provides:

> Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings [before April 1, 1997]—

> (A) the amendments made by this subtitle shall not apply, and
>
> (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

This provision of IIRIRA seemingly supports the Attorney General because it makes judicial review of final orders of deportation for aliens under the transitional rules subject to old INA § 106 (as then in effect), which IIRIRA § 306(b) repeals. Old INA § 106 made the judicial review provisions of the APA, codified at 28 U.S.C. ch. 158 (1994), applicable (with modifications) to immigration decisions. The APA judicial review provisions vest the courts of appeals with jurisdiction to review final agency action. *See* 28 U.S.C. § 2344 (1994).

The IIRIRA provision establishing "transitional rules," IIRIRA § 309(c)(1), is, however, expressly subject to IIRIRA § 309(c)(4)(G), which provides:

> (4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the cases described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of date of enactment of this Act) to the contrary—
>
> * * *
>
> (G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered . . . by section

> 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2) (A)(i) of such Act (as so in effect).

Goncalves falls within the language of subpart (G), as the parties recognize.[6]

A straightforward reading of subpart (G) leads to the conclusion that IIRIRA does not permit initial jurisdiction in the courts of appeals to hear "appeals" by aliens, like Goncalves, who have been convicted of two crimes of moral turpitude. The section says "there shall be no appeal," a reference to an appeal to the courts of appeals. From this, it is clear that there is no grant of jurisdiction to the courts of appeals over this category of transitional cases, i.e., claims by aliens deportable by reason of having committed specified criminal offenses.

Despite the literal language of IIRIRA § 309(c)(4)(G), the Attorney General argues that subpart (G) should be read differently, in light of the separate judicial review provisions for aliens governed by the permanent rules found at IIRIRA § 306. The Attorney General relies on IIRIRA § 306(a), which adds new INA § 242(g), 8 U.S.C.A. § 1252(g) (West Supp.1998):

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[6] There is no doubt that Goncalves' concession that he had been convicted of two or more "crimes involving moral turpitude, not arising out of a single scheme of criminal conduct," rendered him deportable pursuant to old INA § 241(a)(2)(A)(ii). Before the IJ, Goncalves conceded at least two convictions for which he was punished by a term of imprisonment longer than one year, so "both predicate offenses are . . . otherwise covered by section 241(a)(2)(A)(i) of [the old INA.]"

> "(g) EXCLUSIVE JURISDICTION.—Except as provided in this section [i.e., new INA § 242] and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."

Although IIRIRA § 306 is generally concerned with the permanent rules and has an effective date of April 1, 1997 and so does not affect Goncalves, there is a special effective date for that part of IIRIRA § 306 comprising new INA § 242(g).[7] Thus, new INA § 242(g) applies to Goncalves' claims. The Attorney General argues that this provision was meant to consolidate all review in the courts of appeals, so that Goncalves can make his claims, if at all, only in the courts of appeals.

But new INA § 242(g) does not read as the Attorney General suggests. The subsection does not refer to consolidation of all cases in the courts of appeals or state that the courts of appeals would have "exclusive jurisdiction." The "exclusive jurisdiction" title refers to the grants of jurisdiction provided in new INA § 242 as does the "except as provided in this section" language. The language is not meant to consolidate all review in the courts of appeals; indeed, new INA § 242 has explicit provisions referring to jurisdiction in courts other than the courts of appeals. There are provisions gov-

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[7] That special rule, contained in IIRIRA § 306(c), as amended by Act of Oct. 11, 1997, § 2, Pub. L. No. 104-302, 110 Stat. 3656, 3657, provides that new INA § 242(g) shall apply "without limitation to claims arising from all past, pending or future exclusion, deportation or removal proceedings under this Act."

erning habeas corpus proceedings, and, in a defined category of cases, providing for exclusive jurisdiction in the District Court of the District of Columbia.

Indeed, new INA § 242 contradicts the Attorney General's argument. Of particular significance is new INA § 242(e)(2), which states that the habeas corpus review of orders denying aliens entry to the United States is restricted to certain narrow questions. This section assumes that such jurisdiction exists, presumably pursuant to 28 U.S.C. § 2241. As the courts of appeals ordinarily may not issue original writs of habeas corpus but instead will refer such petitions to the appropriate district court, *see* Fed. R. App. P. 22(a), and as the Supreme Court will only consider a petition for an original writ of habeas corpus in very limited circumstances, *see* Sup. Ct. R. 20(4)(a), the statute apparently assumes that such review will initially be in the district courts. Thus, the language of new INA § 242(g) assumes the existence of some habeas jurisdiction in the district court.

We do not, in conclusion, read the new INA § 242 as granting jurisdiction to the courts of appeals in transitional rules cases over this category of claims. The more difficult question, we believe, is whether these provisions were meant to preclude *any* exercise of jurisdiction, even on habeas, over claims, constitutional or otherwise, by aliens in the position of Goncalves.

B. Habeas Jurisdiction in the District Courts

1. Positions of Parties

We wish to be clear about the Attorney General's position. She argues not that all review is precluded but rather that some limited scope of review is available to hear certain sorts of claims, and that Goncalves' claims do not fall within the permissible scope of review. The Attorney General argues that there must be an Article III court available to hear substantial claims of violation of constitutional rights amounting to a fundamental miscarriage of justice.[8] But Goncalves himself presents no such claim, she asserts. In addition, the Attorney General argues, there must be inherent authority in the judiciary to review certain non-constitutional claims, i.e., whether the person being deported meets the statutory prerequisites: that the person is an alien, has been convicted of the crimes, and the convictions are of the sort which meet the statutory definitions. But Goncalves, she notes, does not present

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[8] We express no opinion on the Attorney General's constitutional arguments. We note, however, that the Attorney General's formulation of the standard of constitutionally-compelled review is drawn from the very different context of successive federal habeas corpus petitions by prisoners in state custody who have already had one or more opportunities for full judicial process and appeals in the state system, with an opportunity for further review in the Supreme Court by a writ of certiorari, and one or more opportunities for review in the federal judiciary on their first habeas petition. *See Herrera v. Collins*, 506 U.S. 390, 404, 113 S. Ct. 853, 862-63, 122 L.Ed.2d 203 (1993). Goncalves, in contrast, is in federal custody and has only been afforded the first level of *administrative* review of his case. Indeed, the Attorney General's position is that there should be no judicial review in any court of Goncalves' claims.

these types of claims either. The Attorney General essentially argues there is an inherent jurisdiction to hear these constitutional and statutory prerequisite categories of claims, although IIRIRA itself makes no provisions for either type of review as to aliens like Goncalves.

It is far from clear from what source the Attorney General finds the authority for such review. One theory is that the authority may be derived not from an explicit statutory text but, at best, from the interstices of the various immigration statutes. Another theory is that the source of jurisdiction is the Constitution itself. Both theories present obvious problems.

Goncalves asserts that the question he poses—a question of statutory construction—is subject to judicial review. In contrast to the Attorney General, Goncalves grounds judicial review directly on statutory authority: the grant of habeas corpus jurisdiction under 28 U.S.C. § 2241. This grant has been part of the juridical fabric of this nation since its enactment in the first Judiciary Act. *See* Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82; *see generally* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* ch. 11, § 1 (4th ed.1996); Erwin Chemerinsky, *Federal Jurisdiction* § 15.1, at 780 (2d ed. 1994) (noting Blackstone's reference to the writ of habeas corpus as "the most celebrated writ in English law"). It is only if we conclude that Congress intended in IIRIRA to eliminate that grant of habeas jurisdiction that we must face the question of whether some form of review on habeas

is mandated by the Suspension Clause,[9] or, as Goncalves argues, by the Due Process Clause of the Fifth Amendment or by Article III itself, and, if so, the nature of that review.

2. Congressional Intent to Repeal 28 U.S.C. § 2241

The Attorney General argues that Congress has repealed 28 U.S.C. § 2241, as applied to immigration cases such as this one. Under *Felker*, *supra*, the question we must decide is whether Congress has expressly repealed or modified the federal courts' habeas authority, here under § 2241. *Felker* makes clear that if Congress intends to repeal or restrict habeas jurisdiction under § 2241, it must say so explicitly. Thus, we will not find a repeal of § 2241 merely by implication, but only by express congressional command.

In *Felker*, the issue was whether Title I of AEDPA, which through §§ 106(b)(1) and (b)(2) amended 28 U.S.C. § 2244(b), also was meant to eliminate the Supreme Court's original habeas jurisdiction under 28 U.S.C. §§ 2241 and 2254. In concluding that AEDPA tit. I preserved the Supreme Court's jurisdiction to issue original habeas petitions, the *Felker* court applied the model of decision the Supreme Court had used more than a century earlier in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 19 L.Ed. 332 (1869).

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[9] The Suspension Clause provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

Ex parte Yerger refused to read an act of Congress as impliedly impairing habeas corpus jurisdiction in light of its constitutionally protected status. Previously, in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1869), the Supreme Court had upheld an act of Congress that expressly restricted appeals of habeas cases under the Judiciary Act of 1867, 15 Stat. 385, for prisoners in state custody. In *Ex parte Yerger*, the Court avoided impairing the historical core of habeas jurisdiction, and addressing the attendant Suspension Clause issues, by interpreting the repeal at issue in *Ex parte McCardle* as affecting only appeals under the 1867 Act, and not appeals under the Judiciary Act of 1789, which provided the grant of habeas jurisdiction for prisoners in federal custody. As Goncalves is in federal custody and seeks review of an administrative proceeding, not collateral review of a judicial proceeding, his case is directly governed by *Ex parte Yerger*.

Felker regarded *Ex parte Yerger* as adopting a general rule of construction that any repeal of the federal courts' historic habeas jurisdiction, whether for prisoners in federal or state custody, must be explicit and make express reference specifically to the statute granting jurisdiction. Application of the *Ex parte Yerger* rule to Goncalves' case is thus even more appropriate than in *Felker* itself, as Goncalves is in federal custody and has had no judicial review of his claims whatsoever.

There is no question that, unless it has been expressly repealed, § 2241 provides a basis for reviewing immigration decisions. Aliens in custody of federal immigration officials have traditionally been able to

obtain review of immigration decisions by petitioning for a writ of habeas corpus under what is now § 2241. Soon after the federal government began to regulate immigration, the Supreme Court considered an argument that the habeas corpus statute did not apply to an alien under a theory that the only restraint on his liberty was that "he was not permitted to enter the United States." *United States v. Jung Ah Lung*, 124 U.S. 621, 626, 8 S. Ct. 663, 666, 31 L.Ed. 591 (1888). The Supreme Court rejected this argument as applied to aliens in custody of federal officials. *See id.* Habeas corpus review remained the principal avenue for judicial oversight of immigration laws until the Supreme Court's decision to allow more expansive review of immigration decisions under the APA, later codified in old INA § 106. *See Shaughnessy v. Pedreiro*, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868 (1955).

Although the Attorney General suggests that the application of the APA to immigration decisions *repealed* habeas review under § 2241, we find no authority that supports this proposition. The decisions that she says stand for the proposition that APA review in the courts of appeals precluded any jurisdiction in the district courts concern jurisdiction under the APA, not habeas jurisdiction under § 2241. *See, e.g., Agosto v. INS*, 436 U.S. 748, 752-53, 98 S. Ct. 2081, 2084-85, 56 L.Ed.2d 677 (1978) (old INA § 106 "eliminated district court review of deportation orders *under § 10 of the Administrative Procedure Act*, and replaced it with direct review in the courts of appeals . . . ." (emphasis added)). Indeed, the Supreme Court expressly stated that the vesting of jurisdiction to review orders under the APA exclusively in the courts of appeals "of course . . . in no way impairs the

. . . availability of habeas corpus relief." *Foti v. INS*, 375 U.S. 217, 231, 84 S. Ct. 306, 315, 11 L.Ed.2d 281 (1963). The Attorney General's argument that Congress' decision to make available another avenue for judicial review repeals by implication the previous jurisdiction exercised pursuant to § 2241 is precisely what *Felker* and *Ex parte Yerger* do not permit.

The Attorney General contends, in addition, that AEDPA and IIRIRA have expressly repealed jurisdiction under § 2241. We find no such express language. First, the language in IIRIRA that restricts jurisdiction over this category of aliens states:

> [N]otwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of enactment of this Act) to the contrary—
>
> * * *
>
> (G) there shall be no appeal permitted in the case of an alien who is . . . deportable by reason of having committed [particular] criminal offense[s]. . . .

IIRIRA § 309(c)(4). In *Felker*, the language at issue in AEDPA provided that "the grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition . . . for a writ of certiorari." For present purposes we see no significant distinction between the language faced by the *Felker* Court that an order "shall not be appealable" and the language we face that "there shall be no appeal per-

mitted." Both provisions restrict one avenue of relief—in *Felker*, by restricting the Supreme Court's jurisdiction to hear appeals and to entertain writs of certiorari, and in this case, by restricting an "appeal" under the APA judicial review provisions. *Felker* holds that such language is not explicit enough impliedly to impair habeas corpus jurisdiction.

The Attorney General relies also on AEDPA § 401(e), explicitly repealing old INA § 106(a)(10), which had referred to habeas jurisdiction.[10] Section 106(a)(10) had provided:

> (10) any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

Thus, the Attorney General argues, AEDPA eliminates not only the prior authorization for the exercise of habeas jurisdiction (in addition to APA review) in old INA § 106(a)(10), but also the basic grant of habeas jurisdiction contained in 28 U.S.C. § 2241.

However, Congress was explicit that it was striking the reference to habeas in old INA § 106(a)(10). It did not, in contrast, expressly amend or alter 28 U.S.C.

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[10] AEDPA § 401(e) provides

> (e) ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. § 1105a(a)) is amended—
>
> * * * * * *
>
> (3) by striking paragraph (10).

§ 2241. Old INA § 106(a)(10) was a specialized immigration provision which had made clear that aliens with access to the ordinary judicial review processes also could seek habeas review if they were in custody. This provision ensured that such aliens would have a supplemental collateral remedy,[11] and did not apply to aliens who could not obtain review under the APA judicial review provisions. Aliens without other recourse had traditionally been able to obtain review by habeas corpus, even in the face of statutory language precluding all other review. *See Heikkila v. Barber*, 345 U.S. 229, 233-35, 73 S. Ct. 603, 605-06, 97 L.Ed. 972 (1953). In enacting AEDPA, Congress was concerned about abuses of duplicative judicial remedies, and the elimination of old INA § 106(a)(10) served that congressional purpose.[12] It does not follow from the repeal of this provision of the INA that § 2241 habeas jurisdiction has been repealed altogether in immigration cases. Had Congress wished to eliminate any possible habeas jurisdiction under 28 U.S.C. § 2241, it could easily have inserted an explicit reference, but it did not.

This conclusion is reinforced by the fact that both IIRIRA and AEDPA make specific reference when they amend or repeal statutes granting jurisdiction to the federal courts. *See Felker*, 518 U.S. at 659-63, 116 S. Ct. at 2338-39. For example, AEDPA § 440(a), the

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[11] The provision may also have ensured that APA review would be available, despite an argument that the existence of the habeas remedy was an alternative "adequate" remedy that would normally preclude such review. *See Town of Sanford v. United States*, 140 F.3d 20, 22-23 (1st Cir. 1998).

[12] *See* 141 Cong. Rec. S7823 (daily ed. June 7, 1995) (statement of Senator Abraham) (decrying the capacity of aliens to seek "repeated" or "successive" judicial review).

provision at issue in *Kolster*, made specific reference to old INA § 106, the judicial review provision, providing that "Section 106 of the Immigration and Nationality Act (8 U.S.C. § 1105a(a)(10)) is amended. . . ." Likewise, AEDPA § 401(e), eliminating supplemental habeas jurisdiction under the INA, refers specifically to "Section 106(a) of the Immigration and Nationality Act," not 28 U.S.C. § 2241.[13]

Similarly, IIRIRA contains numerous provisions restricting or altering various avenues for judicial review, but in none of these provisions does IIRIRA mention § 2241. For example, IIRIRA § 306, enacting new INA § 242, refers specifically to several different grants of jurisdiction. That new section contains provisions referring specifically to the judicial review provisions of the APA, codified at 28 U.S.C. ch. 158, *see* new INA § 242(a)(1), and to the Declaratory Judgment Act, codified at 28 U.S.C. § 2201, *see* new INA § 242(b)(5)(B), (7)(B). The new INA § 242 purports to restrict the jurisdiction of the federal courts in such proceedings. Indeed, far from repealing § 2241 habeas jurisdiction, new INA § 242 presumes the existence of on-going habeas jurisdiction. This severely undermines the Attorney General's argument for implied repeal of § 2241 in immigration cases. IIRIRA was enacted after *Felker*, and Congress was well aware of the need for specific language if it wished to impair the Great Writ.

Nonetheless, the Attorney General argues that new INA § 242(g), the exclusivity provision, can be read to

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[13] In AEDPA, when Congress wanted to amend habeas relief for state and federal prisoners seeking post-conviction review, it did so explicitly. *See* AEDPA tit. I.

imply a repeal of § 2241 even without a specific reference. She argues that new INA § 242(g) provides that "notwithstanding any other provision of law, no court shall have jurisdiction" "except as provided in this section," i.e. new INA § 242, and so there is no need specifically to repeal § 2241. The new INA § 242, argues the Attorney General, is the only source of jurisdiction in immigration cases. Thus, it would require a specific reference to § 2241 to preserve such jurisdiction, rather than a specific reference to abolish it. *But see Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11, 62 S. Ct. 875, 880-81, 86 L.Ed. 1229 (1942) (noting that, absent a specific repeal of jurisdictional authority, "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage").

This argument leads us to apply the long standing rule disfavoring repeal of jurisdictional provisions by implication, a rule which is particularly appropriate here. *See Felker*, 518 U.S. at 659-63, 116 S. Ct. at 2338-39. Although the breadth of the "notwithstanding" clause is sweeping, a reading which provided for no exceptions would have enormous consequences that are contrary to clearly expressed congressional intent. If the "notwithstanding" clause of subsection (g) is read to preclude *any* jurisdiction except that specifically authorized in new INA § 242, then that conflicts with IIRIRA § 309. Judicial review would be blocked not only for the narrow class of aliens in Goncalves' position, but for every alien subject to IIRIRA's "transitional rules." As new INA § 242 is only applicable for aliens subject to IIRIRA's "permanent rules," *see* IIRIRA § 309, and as new INA § 242(g) is applicable immediately, *see* IIRIRA § 306(c), aliens subject to the transitional rules—i.e., every alien now in the admin-

istrative process whose case began prior to April 1, 1997—could not obtain any judicial review because they cannot take advantage of "this section," i.e., new INA § 242. Such a reading would clearly conflict with the congressional intent expressed in IIRIRA § 309 to preserve review in the transitional period under old INA § 106.

Finally, our refusal to find express repeal of § 2241 in new INA § 242(g) eliminates the need to address serious, novel and complex constitutional issues. We would be loath to find a repeal where that repeal creates serious constitutional problems. We note these constitutional concerns briefly to underscore the wisdom of avoiding them.

First, a finding that there is no statutory provision for any judicial review of the type of claim raised by Goncalves would raise substantial and complex constitutional questions concerning the limits of Congress' power under Article III to control the jurisdiction of the federal courts.[14] The Supreme Court has often interpreted statutes to avoid serious constitutional questions presented where statutory provisions appeared to foreclose review of constitutional claims by an Article III court. *See, e.g., Webster v. Doe*, 486 U.S. 592, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) (interpreting a statute, to avoid constitutional questions, to preserve review of a former CIA employee's claim who challenged a decision to fire him because of his homosexuality); *United States v. Mendoza-Lopez*, 481 U.S. 828, 838-39, 107 S. Ct. 2148, 2155-56, 95 L.Ed.2d 772

[14] Again, we distinguish such claims by aliens from post-conviction habeas proceedings by state and federal prisoners.

(1987) (requiring judicial review of the legality of a deportation order if that order is used "to conclusively establish an element of a criminal offense").

Second, a decision that Congress has repealed § 2241 would require us to decide whether the Suspension Clause of the Constitution permits Congress to do this. Goncalves seeks review under this grant of jurisdiction in a posture which the Supreme Court has recognized is the historical core of the Suspension Clause—jurisdiction to review the legality of detention by executive branch officers. *See Felker*, 518 U.S. at 661-65, 116 S. Ct. at 2339-40 (noting that the writ originally only extended to prisoners in federal custody who were not "detained in prison by virtue of the judgment of a court" (citation and internal quotation marks omitted)); *see also Swain v. Pressley*, 430 U.S. 372, 386, 97 S. Ct. 1224, 1232, 51 L.Ed.2d 411 (1977) (Burger, C.J., concurring) ("[T]he traditional Great Writ was largely a remedy against executive detention.").

Our interpretation also avoids the question of whether the Constitution's Suspension Clause alone, unaided by statute, provides jurisdiction and the equally vexing issue of what kinds of claims are permitted under such novel jurisdiction. That, in turn, would raise the further question of the constitutional minimum content of judicial review for deportation decisions.[15]

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[15] The Attorney General cites to broad statements concerning Congress' power to entrust administrative officials with primarily adjudicating deportation and exclusion cases. *See, e.g., Carlson v. Landon*, 342 U.S. 524, 537, 72 S. Ct. 525, 532-33, 96 L.Ed. 547

For all of these reasons, we find no express congressional intent in the language of either AEDPA or IIRIRA that prevents an alien who is precluded from seeking judicial review under the APA by IIRIRA § 309(c)(4)(G) from seeking a writ of habeas corpus under 28 U.S.C. § 2241 to assert claims of the nature being asserted here. "This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. . . . The words here used do not require an interpretation that would invest executive or administrative officers with . . . absolute, arbitrary power." *Japanese Immigrant Case*, 189 U.S. at 101, 23 S. Ct. at 615. Nor do they require a construction that would force this court to resolve the fundamental constitutional questions a repeal of § 2241 would provoke.

(1952). But those cases took the availability of habeas review for granted. The question being asked was not whether Congress could withdraw habeas, but whether the Due Process Clause required more than the limited review available on habeas. *See Heikkila*, 345 U.S. at 233, 73 S. Ct. at 605 (Congress may constitutionally entrust fact-finding to administrative officials *because* review of the legality of the immigration authorities' actions is available on habeas). In *Heikkila*, for example, the Supreme Court stated that prior Immigration Acts were intended to foreclose judicial review to the fullest extent consistent with the Constitution. *See Heikkila*, 345 U.S. at 234-35, 73 S. Ct. at 605-06. However, under those Acts the availability of review on habeas corpus under § 2241 was never in doubt and the *Heikkila* court regarded that review as the constitutional floor. *See id.*; *see also Landon v. Plasencia*, 459 U.S. 21, 32-34, 103 S. Ct. 321, 329-30, 74 L.Ed.2d 21 (1982) (affirming procedural due process rights of permanent residents in exclusion proceedings); *Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86, 100-02, 23 S. Ct. 611, 614-15, 47 L.Ed. 721 (1903) (recognizing rights of aliens to due process in administrative decisionmaking, enforceable on habeas corpus).

3. Does the Scope of Review Include Goncalves' Claims?

Jurisdiction being proper under 28 U.S.C. § 2241, we address the further question of whether Congress intended to restrict the scope of review on habeas to preclude review of the questions Goncalves poses.

In determining the scope of habeas review, we again start with the language of the statute, § 2241:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had . . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States . . . or
>
> . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

Both subsections (c)(1) and (c)(3) are applicable here. The language of § 2241 itself does not contemplate a limitation of jurisdiction only to constitutional claims; instead, it contemplates challenges based on the "Constitution *or laws* or treaties of the United States."

Indeed, numerous immigration cases under the § 2241 jurisdiction have considered claims of statutory right, sometimes described as an integral part of ensur-

ing due process *of law*. *See, e.g., Brownell v. Tom We Shung*, 352 U.S. 180, 182-84 n. 1, 77 S. Ct. 252, 254-55 n. 1, 1 L.Ed.2d 225 (1956) ("due process," enforceable on habeas, includes "conformity to statutory grounds"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S. Ct. 472, 97 L.Ed. 576 (1953) (rejecting, on habeas, executive branch interpretation of procedural regulation); *Wong Yang Sung v. McGrath*, 339 U.S. 908, 70 S. Ct. 564, 94 L.Ed. 1336 (1950) (rejecting, on habeas, executive branch's interpretation of APA procedural requirements); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 68 S. Ct. 374, 92 L.Ed. 433 (1948) (rejecting, on habeas, executive branch's interpretation of multiple criminal conviction deportation provision); *Delgadillo v. Carmichael*, 332 U.S. 388, 68 S. Ct. 10, 92 L.Ed. 17 (1947) (rejecting, on habeas, executive branch's interpretation of statutory term "entry"); *Kessler v. Strecker*, 307 U.S. 22, 59 S. Ct. 694, 83 L.Ed. 1082 (1939) (rejecting, on habeas, executive branch's interpretation of provision making aliens deportable on ideological grounds); *Mahler v. Eby*, 264 U.S. 32, 44 S. Ct. 283, 68 L.Ed. 549 (1924) (rejecting, on habeas, executive branch's interpretation of findings necessary for deportation after conviction under espionage act); *Gegiow v. Uhl*, 239 U.S. 3, 36 S. Ct. 2, 60 L.Ed. 114 (1915) (rejecting, on habeas, executive branch's interpretation of "public charge" ground of exclusion). As Justice Holmes observed in *Gegiow*, the enforcement of statutory claims is essential to ensuring that the intent of Congress is observed when it chooses to define the grounds for which aliens may be excluded or deported:

> The statute, by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the

> record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon *habeas corpus*.

Gegiow, 239 U.S. at 9, 36 S. Ct. at 2-3 (emphasis in original).

The government relies on dictum in *Yang v. INS*, 109 F.3d 1185 (7th Cir.1997), stating that "an error of law does not support a writ of habeas corpus. . . ." *Id.* at 1196. That decision, however, was describing what the Seventh Circuit considered to be the minimum content of the constitutional writ; recently, the Seventh Circuit has moderated its statement in *Yang* that new INA § 242(g) had repealed 28 U.S.C. § 2241 in all cases. *See Turkhan v. INS*, 123 F.3d 487, 489-90 (7th Cir. 1997).

In other respects, *Yang* and some similar statements in district court opinions, *see, e.g., Mbiya v. INS*, 930 F. Supp. 609, 612 (N.D.Ga.1996) (requiring a "fundamental miscarriage of justice" before a challenge can be made on habeas corpus), have their origin in the very different standard that is applied to review of federal and state court convictions under 28 U.S.C. §§ 2254, 2255. *See United States v. Timmreck*, 441 U.S. 780, 784, 99 S. Ct. 2085, 2087-88, 60 L.Ed.2d 634 (1979) (requiring "complete miscarriage of justice" to set free a convicted prisoner who alleges violation of a nonjurisdictional federal statute or rule).

In neither AEDPA nor IIRIRA did Congress purport to apply state prisoner post-conviction relief rules to the entirely different provisions about deportation of aliens. We are disinclined automatically to import this standard into cases at the core of the traditional writ of habeas corpus—initial review of the legality of executive branch detention. This is especially so in light of the long line of precedent allowing aliens to make statutory claims on habeas. In cases concerning collateral review of state and federal convictions, a prisoner has already had substantial judicial review of his claims, including a trial and direct review of his conviction, often with multiple levels of review, and is seeking post-conviction relief. In Goncalves' case, by contrast, no court, state or federal, has heard his claims. In fact, it is the Attorney General's position that no court will ever have jurisdiction or authority to review her decision interpreting AEDPA § 440(d). The pure statutory claims Goncalves makes here are well within precedent interpreting the core habeas protection provided by § 2241.[16]

We address one final argument in favor of the Attorney General. The Attorney General contends that, because she has discretion to grant or deny this relief from deportation in any event, her decision concerning Goncalves' statutory eligibility for this form of relief is itself not reviewable on habeas. We dis-

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[16] Indeed, the existence of this jurisdiction over statutory claims provides a ready basis for the federal courts to examine one category of questions that the Attorney General says must be allowed: prerequisite questions such as whether the petitioner is in fact an alien, whether he or she has been convicted of crimes that render him deportable within the meaning of the statute, and the like.

agree. Analytically, the decision whether an alien is eligible to be considered for a particular discretionary form of relief is a statutory question separate from the discretionary component of the administrative decision whether to grant relief. *See, e.g., Ipina v. INS*, 868 F.2d 511, 513 (1st Cir. 1989) (contrasting legal question of whether an alien is a "refugee," and thus eligible for asylum, with discretionary decision whether to grant asylum).

Supreme Court precedent also requires us to reject this argument. The Court has determined that the refusal of the BIA to consider an alien's request for discretionary relief, in violation of statute or regulations, is a valid claim on habeas corpus. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L.Ed. 681 (1954). In making certain aliens eligible for discretionary relief, Congress intended the Attorney General or her designated subordinates to make a judgment. A refusal to make that judgment would frustrate Congress' intent. "[I]f the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience." *Id.* at 266-67, 74 S. Ct. at 503. Thus it is no answer to Goncalves' argument to emphasize the broad discretion of the political branches in immigration matters. It was the intent of Congress that such discretion be exercised.

Our holding is narrow and nothing we say should be taken to suggest that such review as is available on habeas is necessarily as broad as the traditional administrative review available under old INA § 106. For example, we are not being asked to "review[ ] and

revers[e] the manner in which discretion was exercised" by examining "the evidence in the record supporting or undermining the alien's claim to discretionary relief." *Id.* at 268, 74 S. Ct. at 503. Whether such review is now available on habeas presents a different question than Goncalves' claim. The Supreme Court noted, in rejecting early attempts to apply the APA to immigration decisions, the very different scope of review required by "deciding on 'the whole record' whether there is substantial evidence to support administrative findings of fact," required by the APA, and the more basic review available on habeas that provides for "enforcement of due process requirements." *Heikkila*, 345 U.S. at 235-36, 73 S. Ct. at 606. That more basic review includes claims of statutory right, but not the broad review of administrative decisionmaking available under the APA. New INA § 242(a)(2)(B) denies jurisdiction to review discretionary decisions, at least for most cases under the permanent rules. We leave to future cases the task of defining the precise limit of the jurisdiction under 28 U.S.C. § 2241 in immigration cases.[17] We hold only that § 2241 allows us to consider the pure statutory question that Goncalves raises in this case.

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[17] Amici law professors argue that habeas jurisdiction also traditionally allowed review, under a "manifest abuse of discretion" standard, of the *exercise* of discretion to deny relief. We do not address the question, which we view as separate and not presented by this case, of whether IIRIRA was intended to foreclose or impose limits on any such review. We hold today only that, on habeas, a petitioner may challenge the immigration authorities' failure to exercise discretion granted by statute.

4. Decisions of Other Circuits

Our approach to the jurisdiction-limiting provisions of both AEDPA and IIRIRA is in conformity with that of our sister circuits. Each circuit court has now held that AEDPA § 440(a), the initial limitation of jurisdiction which IIRIRA § 309(c)(4)(G) carries forward, deprives the courts of appeals of jurisdiction to entertain petitions for review of aliens convicted of specified criminal offenses. In every circuit which has addressed constitutional challenges to this withdrawal of jurisdiction, the court found that preclusion of all judicial review would present serious constitutional questions, and in every case those questions were avoided by noting the continuing availability of habeas review. Although the cases diverge in their approaches, they all agree on these two basic points—that Congress can constitutionally withdraw jurisdiction over such petitions for review under old INA § 106, but that some jurisdiction remains on habeas.[18] *See Turkhan*, 123 F.3d at 489-90; *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997); *Auguste v. Attorney General*, 118 F.3d 723, 726 n. 7 (11th Cir. 1997); *Ramallo v. Reno*, 114 F.3d 1210, 1214 & n. 1 (D.C. Cir. 1997); *Williams v. INS*, 114 F.3d 82, 83-84 (5th Cir. 1997); *Fernandez v. INS*, 113 F.3d 1151, 1154-55 (10th Cir. 1997); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996); *Hincapie-Nieto v.*

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[18] *Hose v. INS*, 141 F.3d 932 (9th Cir. 1998) also concludes that some form of review is constitutionally compelled. *Hose* interpreted a different provision of IIRIRA and a different claim and found that, in light of the availability of review in the court of appeals over the petitioner's claim, no habeas relief was available. *See id.*

INS, 92 F.3d 27, 30-31 (2d Cir. 1996); *Duldulao v. INS*, 90 F.3d 396, 400 n. 4 (9th Cir. 1996).[19] Indeed, many of the courts which have considered constitutional challenges cited *Felker* in support of the view that some jurisdiction remains on habeas, and some noted its holding disfavoring repeal of 28 U.S.C. § 2241 by implication.

Thus, although no circuit court has yet directly faced the issue of whether a court has jurisdiction on habeas to consider a claim like Goncalves', the great weight of circuit authority is in favor of some form of habeas review for aliens in Goncalves' position. We conclude that Goncalves properly brought his claim in the district court under its § 2241 habeas jurisdiction.

IV. Retroactivity of AEDPA § 440(d)

We turn to the statutory merits question: whether Congress intended for AEDPA § 440(d)'s restrictions on § 212(c) relief to apply retroactively to persons in Goncalves' position. The Attorney General's *Soriano* opinion concludes that the restrictions are fully retroactive and are applicable even to pending applications. We reject the Attorney General's reading of *Landgraf*, *supra*, a reading that the Supreme Court has also recently rejected. *See Hughes Aircraft*, 520 U.S. at ——-——, 117 S. Ct. at 1876-78. We conclude that Congress

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[19] The Eighth Circuit and the Fourth Circuit have each applied the jurisdiction-limiting provisions of AEDPA § 440(a) in short per curiam decisions, without considering whether habeas review remains available. *See Mendez-Morales v. INS*, 119 F.3d 738 (8th Cir. 1997) (per curiam); *Dehaney v. INS*, No. 96-1449, 1997 WL 135664 (4th Cir. 1997) (unpublished per curiam).

did not intend AEDPA § 440(d) to apply retroactively to Goncalves' application.

A. Deference

Initially, we must consider what deference is owed to the Attorney General's *Soriano* decision holding that AEDPA § 440(d) is retroactive and applies to pending applications for § 212(c) relief. The Attorney General argues that the plain text of AEDPA § 440(d) does not answer the question of whether it is retroactive or applies to pending cases and that her interpretation regarding its effective date is, at least, a reasonable one under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984).[20] As the Attorney General notes, under the

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[20] Of course, the Attorney General's argument assumes that it is the Attorney General's decision, not the contrary decision of the Board of Immigration Appeals, that should be considered the "agency interpretation" for *Chevron* purposes, but this is far from clear. *Chevron* requires deference to an administrative agency's interpretation of the statutes implementing the programs it administers. This stems from a recognition that Congress intends certain questions to be answered by expert administrative agencies. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703, 115 S. Ct. 2407, 2415-16, 132 L.Ed.2d 597 (1995) (noting that "the degree of regulatory expertise necessary to [the] enforcement" of the Endangered Species Act counseled deference to an agency interpretation). Here, the immigration specialists at the Department of Justice adopted a view directly contrary to the Attorney General's view in *Soriano*. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 n. 30, 107 S. Ct. 1207, 1221 n. 30, 94 L.Ed.2d 434 (1987) (internal quotation marks omitted). On the other hand, it is the Attorney General

familiar formulation, "[i]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2782.

We think it is a significant question whether the determination of the application of the effective date of a governing statute is the sort of policy matter which Congress intended the agency to decide and thus whether the doctrinal underpinnings of *Chevron* are present here. When Congress wants an agency to determine whether to apply new rules, it usually delegates that discretion expressly. *See, e.g.*, IIRIRA § 309(c)(2), (3) (giving the Attorney General discretion in some cases to determine whether to apply transitional or permanent rules). The question of whether AEDPA § 440(d) applies retroactively may be viewed as a "pure question of statutory construction for the courts to decide," *Cardoza-Fonseca*, 480 U.S. at 446, 107 S. Ct. at 1221, a question that is "quite different from the question of interpretation that arises in each case in which the agency is required to apply [statutory] standards to a particular set of facts" which involves the agency's particular expertise. *Id.* at 448, 107 S. Ct. at 1221. Nonetheless, we will assume arguendo that the Attorney General's opinion is subject to *Chevron* analysis.

Chevron, though, requires a two-step analysis. The Attorney General's argument for deference bypasses the first step, which is to determine whether Congress

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rather than the BIA who is given final authority by Congress to oversee the immigration laws.

has provided an answer to the specific question presented. "If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.'" *Regions Hosp. v. Shalala*, —- U.S. ——, ——, 118 S. Ct. 909, 915, 139 L.Ed.2d 895 (1998) (quoting *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82). Those traditional tools of statutory construction include the familiar presumptions we employ, including *Landgraf*'s presumption against retroactivity.

A contrary approach would permit the executive branch effectively to thwart the intent of Congress, made plain through a careful reading of the statutory provision at issue in context, so long as the executive branch's interpretation was a plausible reading of isolated statutory terms. Instead, as *Chevron* itself made clear, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n. 9, 104 S. Ct. at 2781-82 n. 9.

The Supreme Court has consistently rejected agency arguments for deference which would impair the courts' ability to examine congressional intent using our "'traditional tools of statutory construction.'" *Regions Hosp.*, —- U.S. at —-, 118 S. Ct. at 915 (quoting *Chevron*, 467 U.S. at 843 n. 9, 104 S. Ct. at 2781-82 n. 9). Instead, to determine whether Congress intended AEDPA § 440(d) to apply to such pending applications, we examine that provision in the normal manner. We look to that section not in isolation, but in the context of Title IV of AEDPA (which contains its immigration provisions) and in light of Title IV's overall structure.

We are guided by *Landgraf* principles and seek a plain statement from Congress that expressly provides for retroactive application. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," not by looking at statutory terms in isolation. *Robinson v. Shell Oil Co.*, 519 U.S. 337, ——, 117 S. Ct. 843, 846, 136 L.Ed.2d 808 (1997). In *United States v. Rivera*, 131 F.3d 222 (1st Cir. 1997) (en banc), this court noted " 'the cardinal rule that a statute is to be read as a whole . . . , since the meaning of statutory language, plain or not, depends on context.' " *Id.* at 225 (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 515, 113 S. Ct. 1562, 1565, 123 L.Ed.2d 229 (1993)).

We next examine AEDPA's legislative history, not as a substitute for examination of AEDPA's text, but only as a check to see that our initial textual interpretation does not conflict with "a clearly expressed legislative intention contrary to the statutory language which would require the court to question the strong presumption that Congress expresses its intent through the language it chooses." *Rivera*, 131 F.3d at 226 (citation, internal quotation marks and alterations omitted).

Throughout, our statutory analysis is guided by the Supreme Court's retroactivity jurisprudence. In *Landgraf, supra*, the Supreme Court noted that, while "a court is to apply the law in effect at the time it renders its decision," *id.* at 264, 114 S. Ct. at 1496 (internal quotation marks and citations omitted), there is a strong presumption "deeply rooted in our jurisprudence . . . and centuries older than our Republic" against

retroactivity. *Id.* at 265, 114 S. Ct. at 1497. The Attorney General's application of the new AEDPA restrictions takes away a form of relief that, while discretionary, is plainly substantive, and so implicates *Landgraf*'s presumption against retroactivity.[21] Such discretionary relief has been available in our system in some form since at least 1917; the origin of § 212(c) relief is in the Seventh Proviso to § 3 of the Immigration Act of 1917. *See Francis*, 532 F.2d at 270. In a substantial number of cases, aliens under deportation orders were granted such relief, usually on a showing that they had reformed their ways and become productive members of society. Indeed, from fiscal years 1989 through 1994, it appears that over half of all applications for § 212(c) relief were granted by the agency. *See Mojica v. Reno*, 970 F. Supp. 130, 178 (E.D.N.Y.1997).[22] AEDPA's restrictions on § 212(c)

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[21] In *Kolster*, this court applied *Landgraf* principles and found no retroactivity problems in applying AEDPA § 440(a), which precluded judicial review in the courts of appeals for aliens who are deportable for having committed aggravated felonies, immediately. The question Goncalves raises concerning AEDPA § 440(d) is fundamentally distinct. *Kolster* concerned a purely jurisdictional statute. *Landgraf* makes clear that the "[a]pplication of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Landgraf*, 511 U.S. at 274, 114 S. Ct. at 1502 (internal quotation marks and citation omitted).

[22] The BIA was not bound by the decision of the IJ either as to law or fact, but could review the record de novo. *See Matter of Adetiba*, 20 I. & N. Dec. 506, 507, 1992 WL 195812 (BIA 1992). Goncalves followed this system. If the BIA had been permitted to hear his appeal on the merits, Goncalves would have argued that the IJ had given insufficient weight to the many favorable factors present in his case. *See Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (listing factors).

relief, as applied to Goncalves, thus clearly raise retroactivity concerns, requiring a close examination of AEDPA's text to determine whether Congress has expressly chosen to make its restrictions retroactive.

B. Text

Title IV of AEDPA contains provisions restricting relief from deportation for two categories of aliens—aliens involved in terrorism and aliens convicted of ordinary crimes. Many of these provisions, with the notable exception of the provision of concern to us, AEDPA § 440(d), contain explicit subsections stating that they apply retroactively. We review these other provisions in determining whether Congress likewise intended to apply AEDPA § 440(d) retroactively. Two provisions restricting relief from deportation for aliens involved in terrorism, AEDPA §§ 413 and 421, are particularly helpful in this respect.

Under AEDPA § 413, alien terrorists[23] are made ineligible for several different forms of relief from deportation. That section contains an explicit "effective date" subsection, which provides:

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[23] An alien terrorist is defined by AEDPA § 401(a) as any alien described in old INA § 241(a)(4)(B), now codified at 8 U.S.C.A. § 1227(a)(4)(B) (West Supp. 1998), which provides that "any alien who has engaged, is engaged, or at any time after entry engages in any terrorist activity . . . is deportable." Terrorist activity, in turn, is defined in old INA § 212(a)(3)(B)(iii), now codified at 8 U.S.C.A. § 1182(a)(3)(B)(iii) (West Supp. 1998). Goncalves does not fit this definition.

> The amendments made by this section shall take effect on the date of the enactment of this Act and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date.

Id. § 413(g). This language explicitly provides that the restrictions on relief from deportation imposed on alien terrorists should apply to all cases pending at the time of AEDPA's enactment, as long as "final action" had not yet been taken.

If Congress thought that such restrictions would as a matter of course be applied to pending cases, as the Attorney General's argument requires, then this provision would have accomplished nothing. In *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997), the Court noted "the cardinal principle of statutory construction that it is our duty to give effect, if possible, to every clause and word of a statute." *Id.* at ——, 117 S. Ct. at 1166 (citations, internal quotation marks and alterations omitted); *accord Walters v. Metropolitan Educ. Enters.*, 519 U.S. 202, ——, 117 S. Ct. 660, 664, 136 L.Ed.2d 644 (1997). This is particularly true when there is a contrast in language between two sections of the same statute. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Cardoza-Fonseca*, 480 U.S. at 432, 107 S. Ct. at 1213 (citation, internal quotation marks and alterations omitted).

The Attorney General responds by drawing a distinction between provisions restricting discretionary relief, such as § 440(d) (applicable here), and provisions restricting relief that she says involve no exercise of discretion. The Attorney General argues that discretionary relief, such as § 212(c) relief, is best analogized to prospective injunctive relief, restrictions of which, under *Landgraf*'s judicial default rules, are generally held to be applicable immediately and not to present any retroactivity concerns. *See Landgraf*, 511 U.S. at 273-74, 114 S. Ct. at 1501-02. Thus, the Attorney General concludes, Congress would have expected restrictions on such discretionary relief to apply to pending cases even in the absence of an explicit "effective date" provision, and would have felt no need to include an express provision making those restrictions retroactive.

By contrast, the Attorney General continues, AEDPA § 413 restricts several forms of relief for alien terrorists, not all of which are discretionary. In the absence of an explicit "effective date" provision, the Attorney General concludes, Congress would expect the courts to apply *Landgraf*'s normal presumption against retroactivity. This, she says, explains the difference between § 413, denying relief for alien terrorists, and § 440(d), denying relief for aliens convicted of ordinary crimes.

The Attorney General's argument both misinterprets *Landgraf* and fails on its own terms. The argument misinterprets *Landgraf* because it effectively would apply a presumption in favor of retroactive application to any restriction of relief that could be described as "discretionary." The argument fails to recognize that

"the only 'presumption' mentioned in that opinion is a general presumption *against* retroactivity." *Hughes Aircraft*, — U.S. at —, 117 S. Ct. at 1878. Following the Attorney General's position would have significant consequences. It would require Congress to draft an explicit "effective date" provision to ensure against retroactive application in any case in which a statute takes away relief to which a party was not automatically entitled. But *Landgraf* requires an express congressional command only to overcome its presumption against retroactivity, not to ensure application of a statutory term prospectively. *See Lindh v. Murphy*, — U.S. —, —, 117 S. Ct. 2059, 2062, 138 L.Ed.2d 481 (1997).

Indeed, in *Landgraf* itself a similar argument was made and rejected by the Supreme Court. *Landgraf* refused to apply amendments to Title VII that enlarged the damages that could be awarded to victims of discrimination retroactively, despite the fact that the employer would only face liability if he engaged in conduct that was at the time illegal. "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 282-83 n. 35, 114 S. Ct. at 1506 n. 35. Similarly, in *Hughes Aircraft*, the Court again rejected an argument that a statute is not retroactive if the conduct for which it imposes additional consequences was already unlawful, and thus the defendant had no "right" to engage in such conduct. The *Hughes Aircraft* Court nevertheless determined that the unfairness of imposing "additional burdens" on such conduct retroactively invoked the *Landgraf* presumption. *See id.* at —— - ——, 117 S. Ct. at 1876-77.

Thus, that Goncalves' crimes made him deportable prior to the passage of AEDPA and that the new restrictions merely eliminated a possible form of relief from those consequences, do not suffice to rebut the presumption against retroactivity.

Similarly, the Attorney General's reliance on a description in *Landgraf* of the kinds of statutes that often provoke retroactivity concerns is misplaced. In *Landgraf*, the Court noted, with approval, Justice Story's "influential definition" of impermissibly retroactive statutes:

> Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.

Landgraf, 511 U.S. at 269, 114 S. Ct. at 1499 (citations and internal quotation marks omitted). In *Hughes Aircraft*, however, the Court expressly held that this language "does not purport to define the outer limit of retroactivity;" that such effects on what may be considered "vested rights" "constitute[ ] a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." 520 U.S. at ——, 117 S. Ct. at 1876. The Attorney General's reliance on the fact that aliens have no "vested right" to discretionary relief thus "simply misreads [the Court's] opinion in *Landgraf*," *id.*, converting it from an opinion urging against retroactive application to an opinion requiring special congressional attention to *avoid* retroactive application. Although crimes "involving moral turpitude" did expose Goncalves to deportation before

AEDPA, he had a statutory right to apply for § 212(c) relief unless he had committed an aggravated felony. To preclude Goncalves from applying for such relief now plainly "attaches a new disability" and imposes additional burdens on past conduct. *Hughes Aircraft*, 520 U.S. at ——, 117 S. Ct. at 1876 (quoting *Landgraf*, 511 U.S. at 269, 114 S. Ct. at 1499).

Even if Supreme Court precedent permitted this type of analysis, which it does not, the Attorney General's argument fails on its own terms. She says that the reason alien terrorists are subject to a specific retroactivity provision applying the new restrictions to pending applications (and criminal aliens are not) is that the forms of relief that AEDPA precludes for alien terrorists were not discretionary. In this, the Attorney General misreads the statute.

Alien terrorists had been eligible for certain forms of discretionary relief, and Congress nevertheless provided expressly for application of the new restrictions on these forms of relief to pending applications. Of the five forms of relief from deportation precluded by § 413, only one, "withholding of deportation," is a form of relief to which an alien is entitled if eligible. The rest were committed to the discretion of the Attorney General.[24] Thus, except for the relief precluded by

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[24] The forms of relief that are precluded by § 413, applicable to alien terrorists, include "withholding of deportation" under old INA § 243(h)(1) (entitling an alien who is "likely" to face persecution in his home country to relief from deportation), and "suspension of deportation" under old INA § 244(a) (giving discretion to the Attorney General to suspend deportation in certain circumstances causing "exceptional and extremely unusual hardship" to close family members). In addition, AEDPA § 413 makes

AEDPA § 413(a), all of the relief precluded by § 413 was discretionary relief. The fact that § 413 contains an "effective date" subsection that applies to the entire section suggests that Congress thought it was necessary to be explicit in making the new restrictions applicable to pending applications for relief, regardless of whether the relief was discretionary or mandatory; otherwise, the retroactivity provision would not be needed.

Finally, in another section, Congress explicitly made a restriction on discretionary relief retroactive through an express "effective date" provision. *See* AEDPA § 421. As that section concerns only asylum applications, under the Attorney General's reading no "effective date" provision would be needed because asylum is a discretionary form of relief. *See Cardoza-Fonseca*, 480 U.S. at 428-29 & n. 6, 107 S. Ct. at 1211-12 & n. 6. Thus, § 421 confirms our reading; Congress did not draft express retroactivity provisions only for mandatory forms of relief.

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aliens involved in terrorism ineligible to apply for "voluntary departure" under old INA § 244(e)(1) (giving discretion to the Attorney General in certain circumstances to allow deportable aliens to leave the country voluntarily and thus avoid the negative legal consequences of formal deportation). They are also made ineligible to adjust their status from a nonimmigrant status to that of an alien lawfully admitted for permanent residence under old INA § 245(a), which is a discretionary form of relief, or to apply to have their admission to this country recorded as lawful, despite the lack of such a record, if they were admitted prior to certain dates under old INA § 249, also a form of relief that is committed to the discretion of the Attorney General.

Thus, Congress expected, unless it said to the contrary, that new restrictions would not be applied retroactively to pending applications. This is the most natural reading of Congress' decision to include language in §§ 413 and 421 making the new restrictions applicable to the pending applications of alien terrorists, but omitting such language in § 440(d), the provision denying relief to aliens convicted of specified criminal offenses. Furthermore, Congress did not treat discretionary restrictions on relief differently than restrictions on other forms of relief. The Attorney General offers no other alternative explanation for the different language that the statute uses in dealing with these two categories of alien offenders.

Our interpretation is eminently rational when tested in light of Congress' principal purposes in enacting AEDPA. Those purposes are announced in the Act's title—preventing terrorism and providing for an "effective" death penalty. *See* AEDPA § 1. Congress could well have decided that the unfairness of upsetting settled expectations was outweighed by the importance of fighting terrorism, while deciding against making retroactive the new restrictions on § 212(c) relief for aliens who are not terrorists but are convicted of ordinary crimes.

C. Legislative History

We examine AEDPA's legislative history to determine whether we have erred in our interpretation of the text. *See Landgraf*, 511 U.S. at 262, 114 S. Ct. at 1495 (permitting resort to legislative history to confirm textual analysis); *Cardoza-Fonseca*, 480 U.S. at 432-33, 107 S. Ct. at 1213-14; *Rivera*, 131 F.3d at 226. We do so

only to determine if there is a clearly expressed legislative intention contrary to our textual reading, not as a substitute for a textual analysis. *See Rivera*, 131 F.3d at 226. The history of AEDPA, far from demonstrating a clearly expressed contrary intent, further demonstrates Congress' attention to "effective date" provisions and thus supports our reading of AEDPA's text.

One of the most striking things about the legislative history is that the original Senate version of the bill which became AEDPA did contain express language making the provision which became AEDPA § 440(d) retroactive; but this language was eliminated by the conference committee and was *not* included in the final bill. The origins of § 440(d) were in 1995, when Senators Dole and Hatch and several co-sponsors introduced the restriction on § 212(c) relief that became AEDPA § 440(d). The restriction was introduced as part of an amendment in the nature of a substitute for their own antiterrorism bill, S. 735, 104th Cong. (1995) (the "Senate bill"). *See* 141 Cong. Rec. S7553 (daily ed. May 25, 1995) (text of amendment). That amended Senate bill, at § 303(e)(4), contained the provision that later became AEDPA § 440(d), limiting relief for aliens convicted of ordinary crimes. Within that section, § 303(f) then provided:

> The amendments made by this section [i.e., § 303 of the Senate bill] shall take effect on the date of the enactment of this Act and shall apply to cases pending before, on, or after such date of enactment.

141 Cong. Rec. S7559 (daily ed. May 25, 1995). Thus, the amended Senate bill contained an "effective date" provision, expressly applicable to what later became AEDPA § 440(d), which provided for retroactive appli-

cation of its restrictions on § 212(c) relief.[25] The language is strikingly similar to what later became AEDPA § 413, the provision restricting relief for alien terrorists. The full Senate passed this version of the Senate bill on June 7, 1995. *See* 141 Cong. Rec. S7857, S7863 (daily ed. June 7, 1995).

Meanwhile, the House of Representatives was considering a different version of the antiterrorism bill, H.R. 2703, 104th Cong. (1996) (the "House bill"). Like the Senate bill, the House bill contained provisions restricting relief from deportation both for terrorists and for aliens convicted of ordinary crimes. However, in the case of ordinary crimes, the House bill only eliminated § 212(c) relief for aliens convicted of more serious crimes and was prospective.[26] *See* H.R. 2703, 104th Cong. § 662 (1996), at 142 Cong. Rec. H2295 (daily

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[25] The fact that the Senate bill contained such a subsection is a telling refutation of the Attorney General's argument that the Congress did not believe that such a subsection was necessary for provisions limiting discretionary relief.

[26] The House bill's provisions limiting relief for aliens convicted of ordinary crimes had its origins in H.R. 668, the "Criminal Alien Deportation Improvements Act of 1995." H.R. 668 was included as subtitle E of title VI of the House bill, H.R. 2703. The House version restricted relief by expanding the definition of "aggravated felony," which under old INA § 212(c) made an alien ineligible to apply for such relief. *See* H.R. 2703, 104th Cong., § 662, at 142 Cong. Rec. H2295 (daily ed. Mar. 14, 1996). The House bill was crafted to eliminate the availability of § 212(c) relief for violent and other serious offenders. *See* H.R. Rep. 104-22, at 7-9 (1995). The House bill did not eliminate § 212(c) relief for permanent residents who committed less serious crimes that might nevertheless be said to "involve moral turpitude." Thus, under the House bill, Goncalves' application for discretionary relief would still be heard by the BIA.

ed. Mar. 14, 1996). By contrast, the House bill, like the final legislation, contained explicit "effective date" subsections in its provisions limiting relief for alien terrorists which made those restrictions retroactive. *See* H.R. 2703 §§ 611(b), 612(f), at 142 Cong. Rec. H2293, H2294 (daily ed. Mar. 14, 1996) (House bill provisions corresponding to AEDPA §§ 421(b) and 413(g), respectively). When the Senate bill was called up on the House floor on March 14, 1996, the House amended the Senate bill by replacing its text with the text of the House version. *See* 142 Cong. Rec. H2268, H2304 (daily ed. Mar. 14, 1996). The House asked for a conference with the Senate, insisting on its version of the legislation. *See id.* at H2304.

One month later, a bipartisan conference committee emerged with a compromise in the form of AEDPA § 440. The legislation contained both the House bill's expanded definition of "aggravated felony" and the Senate bill's restrictions on § 212(c) relief for aliens convicted of ordinary "crimes involving moral turpitude," but notably did not contain the Senate bill's original language making those restrictions retroactive. *See* H.R.Rep. No. 104-518, at 119 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 952 (adopting § 303(e)(4) of the Senate bill without adopting § 303(f), the subsection that made those restrictions applicable to pending cases). The legislation also contained the House version of the provisions eliminating relief for alien terrorists, and the House language making *those* provisions retroactive. A contrast in statutory language is "particularly telling" when it represents a decision by a conference committee to resolve a dispute in two versions of a bill, and the committee's choice is then approved by both Houses of Congress. *See FEC v. NRA Political*

Victory Fund, 513 U.S. 88, 95, 115 S. Ct. 537, 541-42, 130 L.Ed.2d 439 (1994).

This chronology also illustrates a second important point: Congress' awareness of the issue of whether restrictions on relief should be applied retroactively. In the final legislation, Congress decided to provide for such retroactive application in §§ 413 and 421, but not in § 440(d), a position consistent with the House approach of treating the two categories of aliens differently with respect to AEDPA's temporal reach. "'Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.'" *Rivera*, 131 F.3d at 227 (quoting *Cardoza-Fonseca*, 480 U.S. at 442-43, 107 S. Ct. at 1218-19); *cf. Lonchar v. Thomas*, 517 U.S. 314, 325-27, 116 S. Ct. 1293, 1300, 134 L.Ed.2d 440 (1996) (courts should not read habeas statute to impose a requirement that Congress expressly "*rejected*, by removing [it] from the draft Rule"). Adopting the Attorney General's interpretation would require us to do precisely that, upsetting a compromise provision that was intended to reconcile the House's and Senate's very different approaches to aliens convicted of crimes.

A third point emerges from the legislative history. We note that Congress amended AEDPA § 440(d) when it enacted IIRIRA on September 30, 1996. *See* IIRIRA § 306(d). Three months earlier, on June 27, the BIA had determined that Congress did not intend AEDPA § 440(d) to apply to pending cases. Significantly, the very same Congress that had enacted AEDPA just five months earlier, on April 24, did not take the opportunity to overrule that BIA decision by

providing expressly that the new restrictions were fully retroactive and applied to pending cases. This was true even though Congress specifically amended AEDPA § 440(d) in other respects and was presumptively aware of what was then the governing agency interpretation. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 869-70, 55 L.Ed.2d 40 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (citations omitted)). Such subsequent legislative developments, although never determinative in themselves, can be "significant" clues to congressional intent. *See Cardoza-Fonseca*, 480 U.S. at 430, 107 S. Ct. at 1212; *Sweet Home Chapter*, 515 U.S. at 700-01, 115 S. Ct. at 2414-15. This is particularly so when the amendment to AEDPA § 440(d) was enacted by the same Congress and was enacted after an agency had interpreted the statute in a way which would have required a more explicit statutory statement if Congress intended the statute to be interpreted differently. *Cf. Cardoza-Fonseca*, 480 U.S. at 430, 107 S. Ct. at 1212 (relying on the actions of *subsequent* congresses as clues to legislative intent); *Sweet Home Chapter*, 515 U.S. at 700-01, 115 S. Ct. at 2414-15 (same); *Lomas Mortgage, Inc. v. Louis*, 82 F.3d 1, 6-7 (1st Cir. 1996).

"We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449, 107 S. Ct. at 1222. A careful reading of the text of AEDPA, confirmed by an examination of its legislative history, demonstrates that Congress did not intend AEDPA § 440(d) to apply

retroactively to pending applications for § 212(c) relief by persons convicted of ordinary "crimes involving moral turpitude."

V. Conclusion

Despite the length of this opinion, our holding is narrow. The district court had jurisdiction over Goncalves' petition for a writ of habeas corpus under 28 U.S.C. § 2241 given the precise nature of the claims asserted. The scope of that habeas jurisdiction is not limited to constitutional claims, but encompasses at least the pure issues of law concerning the applicability of statutory provisions to pending cases which Goncalves has raised. We have rejected an argument that there is no jurisdiction to consider these pure issues of law merely because Goncalves is not entitled to relief from deportation. Rather the question is whether he is entitled to be considered for such relief, and we have determined that he is. However, we need not reach the issue of what review (if any) may be available on habeas in cases when an alien attempts to obtain review of an individual § 212(c) or "cancellation of removal" determination by styling it as a pure issue of law, except to note that Congress apparently intended the scope of such review, if any, to be narrower than the "abuse of discretion" review that was formerly available under old INA § 106, at least for aliens subject to the permanent rules.

We have also determined, through a careful reading of AEDPA's text, confirmed by its legislative history, that Congress did not intend AEDPA § 440(d) to apply retroactively to persons in Goncalves' position. We do not reach Goncalves' constitutional challenges.

The judgment of the district court is *reversed*, and Goncalves' petition for a writ of habeas corpus is *granted* to this extent: the case is *remanded* to the Board of Immigration Appeals for a discretionary determination of the merits of Goncalves' application for relief under old INA § 212(c). It is, of course, up to the Attorney General, through the BIA, whether to exercise her discretion to allow Goncalves to avoid deportation.

APPENDIX B

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
JFK FEDERAL BLDG., ROOM 320
BOSTON, MA 02203

In the Matter of: GONCALVES, RAUL PERCIRA	Case No.: A34-282-192 Docket: BOSTON, MASSACHUSETTS
RESPONDENT	IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Jan 20, 1995.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

(✓) The respondent was ordered deported to Portugal

( ) Respondent's application for voluntary departure was denied and respondent was ordered deported to

( ) Respondent's application for voluntary departure was granted until with an alternate order of deportation to or

( ) Respondent's application for asylum was ( )granted ( )denied ( )withdrawn ( )other.

( ) Respondent's application for withholding of deportation was ( )granted ( )denied ( ) withdrawn ( )other.

( ) Respondent's application for suspension of deportation was ( )granted ( )denied ( )withdrawn ( )other.

(✓) Respondent's application for waiver under Section 212 c of the Immigration and Nationality Act was ( )granted (✓)denied ( )withdrawn ( )other.

( ) Respondent's application for_____was ( )granted ( )denied ( )withdrawn ( )other.

( ) Proceedings were terminated.

( ) The application for adjustment of status under Section (216) (216A) (245) (249) was ( )granted (-)denied ( )withdrawn ( )other.
If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

( ) Respondent's status was rescinded under Section 246.

(✓) Other R reserves rt to appeal due by 1/30/95.

( ) Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

/s/ LEONARD I. SHAPIRO
LEONARD I. SHAPIRO
Immigration Judge
Date: Jan 20, 1995

Appeal: WAIVED (A [I] B)

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Boston, Massachusetts

File No.: A 34 282 192 January 20, 1995

IN THE MATTER OF RAUL PERCIRA GONCALVES

RESPONDENT

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a) (4) of the Immigration and Nationality Act [redesignated as Section 241(a) (2) (A) (ii) of the Immigration and Nationality Act by the Immigration Act of 1990] - convicted of two or more crimes involving moral turpitude.

APPLICATIONS: I&N Act - Section 212(c) - waiver of inadmissability.

ON BEHALF OF RESPONDENT:

Kathleen M. Curley, Esquire
145 Munro East, Suite 300
Lynn, Mass. 01901-1222

ON BEHALF OF SERVICE:

Frank J. Crowley, Esquire
JFK Federal Building
Room 425
Government Center
Boston, Mass. 02203

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent herein is a 26-year-old single, native and citizen of Portugal. Deportation proceedings were instituted against him when the Immigration and Naturalization Service issued an Order to Show Cause on December 11, 1990, in accordance with the provisions of 8 C.F.R. Section 242.1(a), as amended and supplemented by a form I-261, additional charge of deportability, issued on July 11, 1994, in accordance with the provisions of 8 C.F.R. Section 242.16(d) (Please *see* Exhibits R-1 and R-1a). By way of these documents, the Immigration Service contends that the respondent is deportable on the charge set forth above.

During the course of the hearing, the respondent, through counsel, admitted the truth of factual allegations 1 through 4 and factual allegation 6 in the Order to Show Cause, admitted the truth of factual allegations 5 which was added by way of the form I-261, and conceded deportability as charged in the Order to Show Cause and additional charge of deportability. In addition, the respondent designated Portugal as the country for deportation purposes if necessary (*See* Exhibit R-2).

Based upon these admissions and the respondent's concession of deportability, I find that deportability has been established by clear, convincing, and unequivocal evidence.

The respondent has submitted an application for a waiver of inadmissability pursuant to the provisions of Section 212(c) of the Immigration and Nationality Act (*See* Exhibit R-4, as supplemented by Exhibits R-4a, R-5 and R-6 through 9). Upon the basis of the evidence of record, I find that the respondent is statutorily eligible for a waiver under Section 212(c) of the Immigration

and Nationality Act and the only issue which must be resolved is whether he has established that the requested relief should be granted in the outsize [*sic*: exercise] the outsize of discretion.

In reaching a decision in this case, I have taken into consideration the following factors as reflected by the testimony at the hearing and the documentary evidence of record:

The respondent has resided in the United States for the past 22 years, ever since having arrived in this country as a lawful permanent resident alien when he was three and a half years old.

The respondent's family in the United States consists of his mother and two brothers, both of whom are lawful permanent resident aliens, a sister-in-law, and two nephews who are presumably United States citizens.

The respondent alleges that at the present time he lives with his married brother here in the Commonwealth of Massachusetts, and that during the week while he's employed by his brother as a construction worker on the island of Nantucket, that he and his brother live together in an apartment with the project director. However, the respondent alleges that on weekends, he and his brother return to his brother's home where they spend the weekends with the family of the respondent's brother.

According to the testimony of the respondent's brother, the respondent now has become family oriented and interacts to a large extent with the family and with his nephews who are now ages 6 and 8.

The respondent's mother has been, of recent years, residing in a group home as a result of mental illness

from which she suffers, and it is said that the respondent's brother Carlos, presently resides in South Carolina. However there is evidence that the brother Carlos has been ordered to be deported from the United States.

It is the respondent's contention that he came to the United States when he was an infant and does not even remember arriving in this country. He says that he came with his mother and his brothers and perhaps his father and that his father died when he was but five years old.

The respondent further says that his mother worked until he was approximately 12 years old, and then because of her mental illness she had to stop working and the family lived on welfare.

The respondent says that as a result of his mother's mental illness and the manifestations thereof, including loud and violent outburst, he came to feel ashamed, scared and confused and while he attended school in Falmouth up until that period of time, he began drinking and skipping school and began to become involved in criminal trouble. In addition, during that period of time, and for quite a period thereafter, the respondent stayed away from home and lived with friends or with whomever provided him with what apparently consisted of temporary shelter.

The respondent does allege that when he was in foster care for some period of time, that he stopped getting into trouble. However, he says that he has a serious drinking problem which has been the source of all of his criminal and anti-social behavior. He says that when he drank, he became drunk and got crazy and got into trouble. He alleges that he was always drunk

when he committed the crimes and that it was never suggested to him in court that he stop drinking.

From the time that the respondent was 12 years old and continuing up until his most recent incarceration in 1991, he has been involved in an astounding series of criminal activities.

The respondent's crimes which extend over a period of some 12 years consist of larceny, receiving stolen property, motor vehicle and insurance violations, operating after his license was suspended, and operating to endanger, operating while under the influence, assault, and most significantly are crimes of breaking and entering into homes of private citizens and into stores and shops.

According to his testimony, the respondent was incarcerated for the first time in 1987 for having broken and entered into a house in Falmouth. The probation record reflects that upon each of his convictions the respondent was convicted for several different breaks and according to his testimony, he was breaking into houses in order to get money to party with his friends. The 1987 conviction involved a series of events which took place during a one week period.

Thereafter, and after the respondent had served one year of a two year sentence, and after he was released in 1988 he was arrested and charged with parole violation ostenisbly because of an assault and battery. He had only been out of jail for a few months when he was re-arrested and sent back to prison.

After his release, at some point in time, late in 1988 or early 1990 and when he had been out of prison for approximately 19 months, the respondent was once again, arrested and convicted for breaking and enter-

ing, most specifically into a True Value Hardware store and was given a 10 to 12 year sentence. The respondent served some three years of this sentence and was released from incarceration in July of 1994. It appears as though he might have been in state custody until May of 1994 and then was held in INS custody until July of 1994.

The respondent says that since his release in July of 1994 he has recognized his alcohol problem, has continued with Alcoholics Anonymous program that he started in prison and that he has recognized the source of his problem and what needs to be done to resolve it.

As previously mentioned, the respondent now works for a construction company in Nantucket through his brother's good offices and he is paid as a sub-contractor. That is to say the he is paid in cash and is required to report all of the income that he receives on his own income tax returns.

The respondent has submitted a proposed income tax return for the year 1994 as evidence of his intention to pay income taxes. I will accept this as constituting evidence of his intention to pay taxes for the tax year 1994 and I would also make note of the fact that one who is self employed is required to file quarterly estimated income tax returns and to deposit money with the Federal Government for purposes of securing tax payments and not to squirrel money away in the home as is the practice adopted by the respondent. However, at this point in time and inasmuch as the respondent has generally not had a great deal of work experience in the past, I wll attribute this to the fact he is unaware of what must be done with respect to income tax quarterly payments.

The respondent, while he has had some jobs over the past 12 years or so, has really only been employed sporadically and has devoted all of his energies to breaking the laws of the United States.

The respondent's brother testified on his behalf that since his release from incarceration, the respondent has been working on a daily basis, has demonstrated that he is a great worker, shows up every day and he is a much kinder person at the present time. The respondent brother says that he has seen a great change in the respondent since his release from incarceration.

The respondent himself says that he now recognizes that what he has done is wrong, that he apologizes for same, and he would like to have an opportunity to live and work in the United States.

During the time of his incarceration the respondent was cited for one disciplinary infraction for failure to obey orders and on the other hand he also devoted much of his time toward obtaining a GED degree and to attending Alcoholics Anonymous and Narcotic Anonymous programs.

The respondent has very few, if any ties to Portugal in that he has not returned to that country since his arrival in the United States. He does have at least one aunt and one uncle who reside in Portugal, those being apparently the brother and sister of his mother.

The respondent is in good health, does not own any property in the United States, has no other immigration violations, has never received welfare, has never been a member or the military forces of the United States and has not participated in any community activities.

With respect to the issue of rehabilitation while I recognize and commend the behavior of the respondent since his last release from incarceration, I think it is clear to say it is way too early to conclude that the respondent is in fact rehabilitated. In fact, during the entire history of his residence in the United States, he has repeatedly been in and out of jails, been charged with crimes which in the opinion of the court are egregious and has generally terrorized each community in which he has resided. The respondent has, in part, attributed his behavior to his mother's illness and to the lack of supervision during his youth, and while this is a terribly tragic situation, as evidenced by the respondent's brother, the circumstances of his upbringing need not have resulted in a criminal career.

The respondent's brother is an upstanding citizen and family man who has established a business, who is well spoken and articulate and is commendably loyal to his brother.

The respondent, on the other hand, has by his behavior, violated the privilege which was extended to him to be able to live and work in the greatest county in the world. The respondent has not only committed crimes in order to obtain money but in doing so has violated the very sanctity and security of people's homes. It is this sort of behavior which has led to the general breakdown of our society at the present time in that people are not only afraid to walk on the streets for fear of what might happen to them but they, at least, are able to keep in the back of their minds that once they reach the safety of their homes, that they will be able to lead a safe and high quality life. The very idea of a human being who is able to break into another persons home and to ransack it in order to steal the property of

those hard working and decent people is behond my ability to understand. I always thought that there must be some degree of evil which transcends that necessity of committing a crime for the purpose of obtaining money.

Imagine, if you will, breaking into a hardware store of a hard working entrepreneur who has devoted his or her whole life to the building up of a business, who wakes up and gets to work early in the morning and stays and works late at night, just manages to pay all the bills and makes a life for him or herself, and then receives a phone call that their business operation has been violated and broken into and their goods and money stolen. Imagine, if you will, the grief and emotional upset of these people of having now to repair the damage done to their profit and to suffer losses from their own families income because some individual needed money to party with his friends.

I do believe that this sort of criminal activity does reflect a lack of character and integrity which is so pervasive as to require extensive evidence or rehabilitation in order to wipe out the damage and destruction caused in the past.

Certainly the respondent will suffer what I would think to be a serious hardship if he were to be deported from the United States to Portugal. I recognize the fact that he will be separated from his immediate and closet family and be required to return to a country to which he has very few if any ties. On the other hand, the respondent has acquired skills in the United States of which he can avail himself and does at least have an aunt and uncle who might be able to help him in the transition period of his readjustment to another society.

I also recognize that it would be a hardship on his mother and the rest of his family to be separated from the respondent, especially in light of the fact that apparently the respondent's other brother has also been deported from the United States. However, I consider the behavior of the respondent for the past 12 years to be so evil and that I cannot find that the positive and equitable factors that he has demonstrated are sufficient to outweigh his behavior.

As pointed out by the counsel for the Immigration Service, the respondent was placed in deportation proceedings in December of 1990, and knowing that he was facing deportation from the United States he still continued on his course of criminal behavior without regard to the consequences of his actions. Also, even after he was released from jail on previous occasions, he was rearrested and reconvicted of crimes within a short period of time and was recommitted to jail therefore.

The respondent has had numerous opportunities to reform his behavior in the past and has failed to do so. I do take this as being evidentiary of his inability to do so in the future, while all the while hoping that his participation in an Alcoholics Anonymous program and his increased maturity will help him towards rehabilitation. In any event, this is speculative at best.

To the extent that it might be argued that the respondent is required to establish unusual or outstanding equities in order to have discretion exercised favorably on his behalf, I do conclude that his length of residence in the United States, especially inasmuch as it began when he was just three and a half years old, does constitute such an unusual or outstanding equity. Furthermore, when this is combined with the fact that the respondent has never returned to Portugal it

clearly does rise to the level of unusual and/or outstanding.

However, in weighing these circumstances along with the other equities established by the respondent, I find that they are outweighed by the length and nature and extent of his criminal behavior and activities in the United States and I do not find that discretion ought to be exercised favorably with respect to the respondent herein.

One can only hope that the respondent is, as he contends, on the way to his rehabilitation. In any event, the respondent has come too far at this point to be worthy of remaining in the United States and accordingly the following orders will be entered:

ORDER

IT IS HEREBY ORDERED that the respondent's application for a waiver of inadmissibility pursuant to the provisions of Section 212(c) of the Immigration and Nationality Act be and the same is hereby denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Portugal on the charge contained in the Order to Show Cause as amended by form I-261.

/s/ LEONARD I. SHAPIRO
LEONARD I. SHAPIRO
Immigration Judge

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A34-282-192 – BOS Date: MAR 24 1997

In re: GONCALVES, RAUL PERCIRA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

CURLEY, KATHLEEN M.
145 Munroe St. Suite 300,
Lynn, MA 01901-1222

APPLICATION: Waiver of inadmissibility

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are

statutorily ineligble for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano*, Interim Decision 3289 (A.G., Feb. 21, 1997). Accordingly, your appeal is dismissed.

/s/ PAUL W. SCHMIDT
PAUL W. SCHMIDT
FOR THE BOARD

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 97-11795-RGS

RAUL PERCIRA GONCALVES

v.

JANET RENO, ET AL.

MEMORANDUM ORDER ON PETITION FOR A WRIT OF HABEAS CORPUS AND STAY OF DEPORTATION

AUGUST 14, 1997

STEARNS, D.J.

After a hearing, and after consideration of the pleadings, and in particular, the comprehensive and thorough memorandum of law filed by Special Assistant U.S. Attorney Crowley on behalf of the Immigration and Naturalization Service, I determine as follows.

I agree with the government that the district court is divested of statutory jurisdiction by operation of 8 U.S.C. § 1105a which commits review of a final order of deportation to the Circuit Court of Appeals. See *Agosto v. Immigration & Naturalization Service*, 436 U.S. 748, 752-753 (1978). I also note that it appears uncontested that petitioner failed to seek such review within the thirty days authorized by § 309(c)(4)(C) of

the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

I am inclined to agree with the government that amended § 242(g) of the Immigration and Nationality Act (8 U.S.C. § 1252(g)) divests the district court of subject matter jurisdiction, in that petitioner's request for a stay of deportation arises from a decision by the Attorney General to execute a removal order. See *Auguste v. Attorney General*, 1997 WL 400970 (11th Cir. 1997).

Finally, to the extent that the district [court] retains a residual power to provide habeas corpus review of constitutional claims, cf. *Kolster v. INS*, 101 F.3d 785, 790-791 (1st Cir. 1996), I agree with the government that petitioner has presented no claim of a substantial enough nature to warrant relief. See *Mbiya v. Immigration & Naturalization Service*, 930 F. Supp. 609, 612 (N.D. Ga. 1996). First, the Attorney General's determination that § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 applies retroactively to cases pending on its enactment is manifestly correct. See *Kolster*, supra, 101 F.3d at 789. Second, the distinction drawn by Congress between excludable and deportable aliens rest on a "facially legitimate and bona fide reason," and therefore does not violate the Equal Protection Clause. See *Fiallo v. Bell*, 430 U.S. 787, 794 (1977).

ORDER

For the foregoing reasons, the motion to dismiss is ALLOWED. The motion to stay deportation is DENIED.

SO ORDERED.

/s/ RICHARD G. STEARNS
RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNTIED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 97-11795-RGS

RAUL PERCIRA GONCALVES

v.

JANET RENO, ET AL.

ORDER OF DISMISSAL

STEARNS, DJ. AUGUST 14, 1997

In accordance with this Court's Memorandum and Order on Petition for a Writ of Habeas Corpus and Stay of Deportation issued this date,

IT IS HEREBY ORDERED: The Petition is hereby DISMISSED. The Motion to Stay Deportation is DENIED.

SO ORDERED.

/s/ RICHARD G. STEARNS
RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE

By:

/s/ MARY JOHNSON ROBBINS
MARY JOHNSON ROBBINS
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1953

RAUL PERCIRA GONCALVES,
PLAINTIFF, APPELLANT

v.

JANET RENO, ATTORNEY GENERAL;
DORIS MEISSNER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE; DISTRICT, BOSTON DISTRICT INS; DEPARTMENT OF JUSTICE, AND IMMIGRATION AND NATURALIZATION SERVICE.
DEFENDANTS, APPELLEES

Before: TORRUELLA, *Chief Judge*, CAMPBELL, *Senior Circuit Judge*, and SELYA, BOUDIN, STAHL, LYNCH, *Circuit Judges*

ORDER OF COURT

Entered. July 31, 1998

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considerated by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk.

By JANICE M. O'NEIL
JANICE M. O'NEIL
Chief Deputy Clerk

[cc: Messrs. Watt, Gelernt, Stern, Crowley, Duffy, Howard, Vargas]

APPENDIX H

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Suspension of Habeas Corpus Clause of the United States Constitution, Art. I, § 9, Cl. 2, provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

2. Prior to April 24, 1996, section 106(a) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a) (1994), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> **(10) Habeas corpus**
>
> any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

3. After April 24, 1996, and before September 30, 1996, Section 106(a) of the Immigration and Nationality

Act, 8 U.S.C. 1105a(a) (to be codified), provided in pertinent part:

> **Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provisions of any prior Act, except that—
>
> * * * * *
>
> (10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section [1251](a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2)(A)(ii) for which both predicate offenses are covered by section [1251](a)(2)(A)(i), shall not be subject to review by any court.

4. Prior to April 24, 1996, Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994), provided:

> **Nonapplicability of subsection (a)**
>
> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General

without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

5. Effective April 24, 1996,[1] Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (to be codified), provided:

Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General

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[1] Section 212(c) was amended by Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, on April 24, 1996. Further technical amendments were made by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, on September 30, 1996, and those technical amendments were made effective as if they were enacted on the original enactment date of AEDPA. See p. 87a, *infra*. The version set forth in the text reflects both sets of amendments. In addition, Section 304(b) of IIRIRA, 110 Stat. 3009-597, repealed Section 212(c) entirely, but Sections 306 and 309 of IIRIRA, 110 Stat. 3009-607, 3009-625, make clear that this repeal applies only to aliens placed in removal proceedings on or after April 1, 1997. See pp. 86a-89a, *infra*.

without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered by section [1251](a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section [1251](a)(2) (A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section [1251](a)(2)(A)(i).

6. Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252 (Supp. II 1996), provides in pertinent part:

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall

have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

7. Section 401(e) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1268 (Apr. 24, 1996), provides:

> ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS.—Section 106(a) of the Immigration and Nationality Act (8 U.S.C. 1105a(a)) is amended—
>
> (1) in paragraph (8), by adding "and" at the end;
>
> (2) in paragraph (9), by striking "; and" at the end and inserting a period; and
>
> (3) by striking paragraph (10).

8. Section 440 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276 (Apr. 24, 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (Sept. 30, 1996),[2] provides in pertinent part:

> **CRIMINAL ALIEN REMOVAL.**
>
> (a) JUDICIAL REVIEW.—Section 106 of the Immigration and Nationality Act (8 U.S.C. 1105a(a)(10)) is amended to read as follows:

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[2] Section 306(d) of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, made certain technical amendments to Section 440 of AEDPA, Pub. L. No. 104-132, 110 Stat. 1276, effective as if included in the original enactment of AEDPA. See p. 87a, *infra*.

"(10) Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court."

* * * * *

(d) CLASSES OF EXCLUDABLE ALIENS.—Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended—

(1) by striking "The first sentence of this" and inserting "This"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)."

9. Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597 (Sept. 30, 1996) provides:

REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

10. Section 306 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996),[3] provides in pertinent part:

APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242).

* * * * *

(b) REPEAL OF SECTION 106.—Section 106 (8 U.S.C. 1105a) is repealed.

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

* * * * *

(d) TECHNICAL AMENDMENT.—Effective as if included in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132), subsections (a), (c), (d), (g), and (h) of section 440 of such Act are amended by striking

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[3] Public Law No. 104-302, 110 Stat. 3656 (Oct. 11, 1996) made certain technical amendments to Sections 306 and 309 of IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-607, 3009-625, effective as if enacted on the original date of enactment of IIRIRA.

"any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" and inserting "any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)".

11. Section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (Sept. 30, 1996), as amended by Pub. L. No. 104-302, 110 Stat. 3656 (Oct. 11, 1996), provides in pertinent part:

EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

* * * * *

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

* * * * *

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

12. Section 2241 of Title 28, United States Code, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

APPENDIX I

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Interim Decision #3289

In re Bartolome Jhonny Soriano, Respondent

File A39 186 067 - Napanoch

Decided June 27, 1996

Before: Board En Banc: SCHMIDT, Chairman; HEILMAN, HOLMES, VILLAGELIU, MATHON, and GUENDELSBERGER, Board Members. Concurring and Dissenting Opinion: ROSENBERG, Board Member. Dissenting Opinion: VACCA, Board Member, joined by DUNNE, Vice Chairman; HURWITZ, FILPPU, and COLE, Board Members.

HEILMAN, Board Member:

In a decision dated October 12, 1995, an Immigration Judge found the respondent deportable as charged, denied his application for a waiver of inadmissibility pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), and ordered him deported from the United States to the Dominican Republic. The respondent appealed from that decision

on October 23, 1995. Subsequent to the respondent's appeal, Congress amended section 212(c) of the Act, and the Immigration and Naturalization Service has now filed a supplemental brief in response to the respondent's argument, asserting that the recent legislative amendments preclude the respondent from demonstrating his continuing eligibility for section 212(c) relief.[1] Thus, we are faced with the issue regarding the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 ("AEDPA"). We find the respondent eligible for section 212(c) relief, but will deny his appeal as a matter of discretion.

I. PROCEDURAL HISTORY

The respondent is a native and citizen of the Dominican Republic. He entered the United States on March 28, 1985, as a lawful permanent resident. On May 20, 1992, the respondent was convicted under the law of the State of New York of the offense of attempted criminal sale of a controlled substance. Based on this conviction, the Service initiated deportation proceedings against the respondent with the issuance of an Order to Show Cause and Notice of Hearing (Form I-221) dated June 3, 1994. On April 28, 1995, the respondent filed an Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191) pursuant to section 212(c) of the Act. By order dated October 12, 1995, the Immigration Judge found that the respondent was eligible for relief under section 212(c) of the Act, but denied that application in the exercise of

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[1] We acknowledge the contribution of amici in the briefing of this issue to the Board.

discretion. On appeal, the respondent argues that the Immigration Judge erred in the exercise of that discretion.

II. APPLICABLE LAW

Prior to considering the respondent's appeal of the Immigration Judge's discretionary determination, this Board must first address the Service's contention that the recent amendments to section 212(c) of the Act statutorily bar the Board from considering the merits of the respondent's appeal from his section 212(c) application. We note initially that the respondent was clearly eligible for such relief under the law in effect at the time the Immigration Judge rendered his decision.[2]

However, during the pendency of the respondent's appeal from the Immigration Judge's discretionary denial of his application, Congress amended section 212(c) of the Act to read as follows:

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[2] Until April 24, 1996, section 212(c) of the Act read as follows:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of section (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion invested in [her] under section 211(b). *This section shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i).*

Section 440(d) of the AEDPA, 110 Stat. at 1277 (emphasis added).

The respondent, deportable by reason of having committed an offense covered by sections 241(a)(2)(A)(iii) and (B) of the Act, falls within the last sentence of the AEDPA amendment. Thus, we must decide whether Congress intended the respondent to remain eligible for section 212(c) relief after April 24, 1996.

III. EFFECTIVE DATE

Congress did not incorporate an express provision regarding the effective date of section 440(d) of the AEDPA. Initially, then, we must discern the date on which this section of law became effective, and, if effective immediately, whether it applies to those aliens

already in proceedings as of April 24, 1996. If it does so apply to those aliens in proceedings, we must further determine whether the amendment applies to those aliens who filed their section 212(c) applications by April 24, 1996. In resolving these issues of the AEDPA's temporal applicability, we first look to the language of the statute itself. We begin by noting that the paramount index of congressional intent is the plain meaning of the words used in the statute taken as a whole. *See Matter of Grinberg*, 20 I&N Dec. 911 (BIA 1994) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987)); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (stating that in ascertaining the "plain meaning" of a statute, one "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

A. SECTION 440(D) AND PENDING PROCEEDINGS

Initially, we find persuasive evidence to conclude that Congress intended section 440(d) to apply immediately, regardless of whether the Service had placed an alien in proceedings by April 24, 1996. Both general statutory construction and an examination of Congress' inclusion of other effective dates in the AEDPA lead us to this result. General rules of statutory construction hold that the lack of an effective date for legislation indicates that the law should be effective on the date of passage. *See generally* 2 C. Sands, *Sutherland Statutory Construction* § 33.08 (4th ed. 1973). We find no obstacle to the application of this rule in the language of the AEDPA; rather, we find such an interpretation buttressed by Congress' decision to expressly delay the effective date of other subsections of the AEDPA. For example, in section 414(b) of the AEDPA, 110 Stat. at

1270, Congress expressly provided that this amendment "shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of [the AEDPA]." Similarly, in section 442 of the AEDPA, 110 Stat. at 1280, Congress amended section 242A(b) of the Act with regard to certain procedural aspects of deportation hearings and stated, in subsection 442(d), that those amendments "shall apply to all aliens against whom deportation proceedings are initiated after the date of the enactment of [the AEDPA]." The absence of similar language in section 440(d) supports the conclusion that Congress intended section 440(d) of the AEDPA to apply to aliens already in proceedings on April 24, 1996. These express declarations in other subsections of the AEDPA, in conjunction with Congress' silence in section 440(d) of the AEDPA, lead us to conclude that section 440(d) was effective immediately upon enactment and was not limited in applicability to those aliens whose proceedings were initiated after that date.

B. PENDING APPLICATIONS

However, this finding that section 440(d) of the AEDPA was effective immediately and not limited in application to those aliens brought into proceedings after April 24, 1996, does not finally resolve whether this respondent is barred from section 212(c) relief. There remains a subcategory of aliens, including the respondent, who already had applications for section 212(c) relief pending on April 24, 1996. Such aliens include those deportable aliens awaiting their section 212(c) merits hearings, as well as those aliens who have appealed the Immigration Judge's denial of their applications, and those who, having received a grant of

section 212(c) relief, are subject to a Service appeal of the Immigration Judge's decision. In determining congressional intent from the language and design of the AEDPA as a whole, we do not find that Congress' silence regarding the effective date of section 440(d) reflects an intent for the amendment to bar pending applications for section 212(c) waivers. In reaching this conclusion, we note that in section 413 of the AEDPA, which bars alien terrorists from most forms of relief from deportation, Congress expressly indicated that those bars to relief "shall take effect on the date of enactment of the AEDPA and shall apply to applications filed before, on, or after such date if final action has not been taken on them before such date." *See* section 413(g) of the AEDPA, 110 Stat. at 1269-70.

Another basic rule of statutory construction instructs that no provision of law should be so construed as to render a word or clause surplusage. See *Kungys v. United States*, 485 U.S. 759 (1988); *Colautti v. Franklin*, 439 U.S. 379 (1979). By adding the effective date found at section 413(g) of the AEDPA, Congress expressed its clear intent that section 413 of the AEDPA apply specifically to pending applications of alien terrorists. To construe this same intent by Congress' silence in section 440(d) of the AEDPA would require us to conclude that the "before, on, or after" language of section 413(g) of the AEDPA is unnecessary and irrelevant to whether that section applies to applications for asylum pending before the AEDPA's enactment. This we decline to conclude. Rather, we interpret Congress' omission of the "before, on, or after" language in section 440(d) to indicate its intent that aliens with applications pending on April 24, 1996, should not be statutorily

barred from section 212(c) relief by operation of the AEDPA.[3]

This conclusion is consistent with the approach to statutory interpretation set forth by the United States Supreme Court in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In that case, the Supreme Court observed that when deciding whether changes in law should be applied to pending controversies in the absence of express congressional directive, "settled expectations should not be lightly disrupted." *Landgraf v. USI Film Products, supra*, at 1497. By applying section 440(d) of the AEDPA to only those applications for section 212(c) relief filed on or after the date of the enactment of the AEDPA, the unique expectations of aliens whose applications for section 212(c) relief were pending prior to the enactment of the AEDPA are not disrupted. Such aliens demonstrated, with the filing of their pre-AEDPA applications, their expectation that although they were deportable under various provis-

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[3] Similarly, we note that silence cannot reasonably be interpreted as evidencing a congressional intent to apply the new limitations in section 212(c) only to those aliens whose *convictions* for the relevant offenses occurred on or after the date of enactment of the AEDPA because Congress expressly stated that result in the AEDPA when such was its intent. *See* section 440(f) of the AEDPA, 110 Stat. at 1278 (stating that the amendments to the aggravated felony definition "apply to convictions entered on or after the date of enactment"). Moreover, as regards the issue of "settled expectations" discussed below, both the Board and the courts have noted that aliens cannot reasonably argue " 'that they somehow relied on the availability of a discretionary waiver of deportation when choosing to engage in [criminal] activity.' " *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 964 (BIA 1995) (quoting *DeOsorio v. United States INS*, 10 F.3d 1034, 1042 (4th Cir. 1993)).

ions of the Act, they would be able to present evidence of favorable social and humane considerations that might countervail evidence of their undesirability as lawful permanent residents. *See generally Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The interpretative approach enunciated by the Supreme Court in *Landgraf* supports the conclusion that Congress did not intend by its silence to disrupt the expectations of those aliens whose applications for section 212(c) relief were pending on April 24, 1996.

Moreover, this conclusion is consistent with the approach adopted by Congress with its amendment of section 212(c) of the Act by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in which a statutory 5-year aggravated felony bar to that relief was made applicable to aliens who applied after the date of the enactment of that 1990 amendment. *See Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

C. APPLICABILITY TO RESPONDENT'S SECTION 212(C) REQUEST

The respondent applied for section 212(c) relief on April 28, 1995, prior to the April 24, 1996, enactment of the AEDPA. Accordingly, the bar to section 212(c) relief added by the amendment of that section by section 440(d) of the AEDPA does not apply to the respondent's application for relief. There is no question that the respondent is eligible for section 212(c) relief by the version of that section that was in effect prior to its amendment by section 440(d) of the AEDPA. That is, the respondent is not an alien convicted of an aggravated felony who served for such felony a term of imprisonment of at least 5 years. Thus, we find the

respondent eligible for relief under section 212(c) of the Act, and we proceed to the question of whether he merits that relief in the exercise of discretion.

III. DISCRETION

Notwithstanding the respondent's continued eligibility for a waiver of inadmissibility, we ultimately disagree with his appellate argument that the Immigration Judge erred in finding that he did not warrant a discretionary waiver pursuant to section 212(c) of the Act. As the Immigration Judge correctly noted, the respondent's attempted criminal sale of cocaine, in addition to his three other drug-related felonies, require a demonstration of outstanding or unusual equities before the respondent may receive a section 212(c) waiver of inadmissibility. *See Matter of Marin*, *supra*; *cf. Matter of Burbano*, 20 I&N Dec. 872, 879 (BIA 1994). We agree with the Immigration Judge that the respondent has failed to demonstrate such equities so that he may overcome his serious and recent drug trafficking crimes.

The respondent testified at the hearing that he has various family ties in the United States, including his mother, two siblings, and his United States citizen son. Moreover, the respondent explained that his son lives with his ex-wife, and that his family assists them financially. The respondent's mother and sister also testified on his behalf, and while we find it noteworthy that the respondent's family members attended the hearing, we do not find that this familial support alone rises to the level of outstanding or unusual. The respondent maintains various family ties in the Dominican Republic, including three daughters and four siblings. He arrived

in the United States only 10 years ago as a 25-year-old adult, and his employment during his residence in the United States has been sporadic.

Regarding his rehabilitative efforts, we note that the respondent testified that he has participated in a drug rehabilitation program while he has been incarcerated, and that after 18 years of drug use, he has maintained a drug-free lifestyle while in prison. Moreover, he testified that he has also received his GED while incarcerated, and he has recently strengthened his religious beliefs. We agree with the Immigration Judge that the respondent has demonstrated a willingness to continue his progress towards a drug-free and crime-free lifestyle and has taken steps towards rehabilitation. *See Matter of Arreguin*, Interim Decision 3247 (BIA 1995). However, considering these factors in conjunction with his family ties here and abroad, and his relatively short period of residence in the United States, we can not find that the respondent has demonstrated sufficient equities to overcome his four recent drug trafficking felonies. *Cf. Matter of Burbano*, *supra*. Accordingly, we will dismiss the respondent's appeal.

ORDER: The appeal is dismissed.

CONCURRING AND DISSENTING OPINION: Lory D. Rosenberg, Board Member

I respectfully concur in part and dissent in part.

Our decision today seeks to resolve the ambiguity presented by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), which amends the category of otherwise eligible lawful permanent resident aliens precluded from a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)(1994).

The text of this section, as set forth by the majority, contains no express provision specifying an effective date for this amendment. The majority opinion properly recognizes that the fact that the AEDPA became law on April 24, 1996, is not dispositive of the effect of section 440(d) on an alien who "is deportable" on the grounds of deportability designated in that section.[1]

In essence, we hold that two related factors, traditional principles of statutory construction and Supreme

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[1] This "ill-advised" provision of AEDPA is less than artfully drawn, having been enacted at the 11th hour as part of a bill ostensibly addressing the deportation of terrorists, not the deportation of "long-term legal residents." *See* President's Remarks on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 717 (Apr. 29, 1996). While section 440(d) refers to those "deportable by reason of having committed any criminal offense covered" by specified sections of the Immigration and Nationality Act, the only aliens so deportable are aliens who actually have been convicted of such offenses.

Court law interpreting the application of new statutes to pre-existing circumstances, must control the reach of this provision of the AEDPA. *See Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994). In the context of the appeal before us, it is necessary only to find, as the majority does, that the amendment does not apply to pending applications already filed by aliens in deportation proceedings. Thus, the respondent, who is deportable by reason of a conviction for a covered offense, remains eligible to have his pending application for a waiver of deportability under section 212(c) determined. For purposes of the scenario presented in this appeal, I concur.

I. THE SILENCE OF THE STATUTE

The silence of the statute with regard to its impact upon conduct and other events which already have taken place is significant. Nothing in the text or the legislative history of the AEDPA indicates that section 440(d) should be applied retroactively to pending cases or pre-amendment circumstances, or that this silence was due to an "accident of draftsmanship." *INS v. Phinpathya*, 464 U.S. 183, 191 (1984). By contrast, as the majority discusses, other sections of the AEDPA expressly address the effect of the particular provision on circumstances existing prior to its enactment. *See, e.g.*, section 413(g) of the AEDPA, 110 Stat. at 1269-70.

As recognized consistently by the Supreme Court, retroactivity is not favored in the law. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988). A presumption against retroactivity generally is consistent with legislative and public expectations as a safeguard against unfairness. *Landgraf v. USI Film*

Products, *supra*, at 1501. This principle dates back to English common law, and even to Roman law. *See, e.g.*, *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806); *Dash v. Van Kleeck*, 7 Johns. 477, 502-03, 505 (N.Y. 1811) (the prince may enact a retrospective law as long as it is done expressly).[2]

In *Landgraf v. USI Film Products*, *supra*, the Supreme Court restated the principle that a statute shall not be given retroactive effect unless expressly provided by Congress. Specifically, the Supreme Court cautioned that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct which occurred prior to that date." *Id.* at 1493.

To the extent that the majority decision is understood to mean either that the language in the statute as a whole is reconciled or that the *Landgraf* principles, discussed below, are properly observed only by finding that aliens who have *filed applications* for section 212(c) waivers by April 24, 1996, are not subject to section 440(d), I must differ. I write separately because I believe this Board's decision requires clarification on these points.

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[2] *See Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996) (discussing the specific language in the AEDPA relating to restrictions upon release from custody, and concluding that any interpretation of the Act applying it to offenses committed before April 24, 1996, (and convictions obtained before that date) would raise serious constitutional issues).

II. STATUTORY CONSTRUCTION AND RETROACTIVITY

As the agency implementing the statute, we recognize that a statutory construct involving silence in one provision but not another requires us to give effect to each provision. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (holding that the Board may not blur the distinctions between two related but separate statutory standards or reduce them into one); *Matter of Hou*, 20 I&N Dec. 513 (BIA 1992) (recognizing that Congress' use of different terminology in two sections of the statute requires the Board to give each independent effect).

In fact, this is precisely what was done by this Board in *Matter of A-A-*, 20 I&N Dec. 506 (BIA 1992), where we looked to the statutory language in various sections of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, in order to determine the applicability of the amendment of section 212(c) contained in that enactment. Although the section was silent as to its applicability to prior convictions, the express language of the statute made that amendment applicable to pending applications.[3]

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[3] I note that our decision in *Matter of A-A-*, *supra*, also involved a situation, not present here, in which a retroactive application was necessary in order for the law to be effective. *See also Matter of Gomez-Giraldo*, 20 I&N Dec. 957 (BIA 1995) (finding 5-year incarceration bar would be delayed for 5 years if not applied to prior convictions).

Coupled with the principle enunciated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, at 1497, that when new provisions attach new legal consequences to prior events, "settled expectations should not be lightly disrupted" (unless Congress expressly states such an intent), these precepts militate in favor of adjudicating the respondent's waiver application according to the prior law. For the sake of brevity, I will refer to these two considerations—the requirement that we must interpret silence in a provision so as to give effect to the whole statute, and the doctrine of settled expectations as foreclosing the retroactive application of a new or amended statute to prior conduct—as the "*Landgraf* principles."

Semantic sparring over whether a new provision can be retroactive because it is being applied to an adjudication we are conducting in the present is not a useful exercise. Nonetheless, the dissent focuses on the application, which is a continuing one, rather than on past events and expectations which are settled, and avoids addressing the issue. The issue is whether the new provision *operates* retroactively. That is, does it affect the settled expectations of the parties, in this case, the respondent, as best described in the *Landgraf* principles.[4] Moreover, this Board previously has acknowledged that eliminating section 212(c) relief *does* have

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[4] The predisposition against a retroactive construction of laws which operate to affect prior conduct is the principle that an individual should be able to act with reasonable certainty of the legal consequences. *See Chew Heong v. United States*, 112 U.S. 536, 559 (1884); *see also* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

retroactive effect. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995); *Matter of A-A-*, *supra*.

In this instance, even though the determination of eligibility for a waiver under section 212(c) may be prospective, the restriction in the amended provision has a retroactive operation or effect as it constitutes a new legal consequence which attaches, at a minimum, to any lawful permanent resident already subject to an Order To Show Cause or otherwise in the agency "pipeline." It is arguable that the legal consequences attach, in fact, to the conviction itself and even to the commission of the offense. Thus, as I discuss below, I believe that to find the amended provision applicable to all applications, as does the dissent, or only to already-filed and pending applications, as does the majority, falls short of the proper observance of the *Landgraf* principles.

A. *Landgraf* Principles and Board Precedent

Previously, the Board held that where new statutory provisions affecting eligibility for relief from deportation come into effect during the pendency of a deportation hearing or an administrative appeal to this Board, and there exists no statutory directive to the contrary, the new statutory provisions shall be applied to the application for relief before us, and the application may be denied on the basis of the statutory amendment. *Cf. Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993). Although the dissent clings to this position, it simply is not applicable here.

Since our decision in *Matter of U-M-*, *supra*, the United States Supreme Court issued its decision in

Landgraf v. USI Film Products, *supra*, in which it comprehensively discussed the issue of the application of statutory amendments to pending controversies. As I understand the dissent to assert that a silent statute is not only effective when signed by the President, but applies to all prior or pending events or conduct, I note that in *Landgraf*, the Supreme Court reconciled the apparent conflict between the presumption that "a court must apply the law in effect at the time it renders its decision," and the presumption against retroactivity. *Landgraf v. USI Film Products*, *supra*, at 1486-87 (citing *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974)).

In fact, in *Matter of Gomez-Giraldo*, *supra*, in which we last visited the impact of the Supreme Court's reasoning in *Landgraf v. USI Film Products*, *supra*, we held that the aggravated felony bar added to section 212(c) of the Act by a previous amendment implicated none of the concerns enunciated in *Landgraf*. We reasoned that, because that amendment, by its express terms, applied only to those applications for relief made on or after the effective date of the amendment, it would not disturb a lawful permanent resident's settled expectations that he or she could apply for and be granted a waiver under section 212(c). *Matter of Gomez-Giraldo*, *supra*, at 963-64. Our holding today, relating to an amendment with no express language, is entirely consistent with that decision and the reasoning underlying it.

B. *Landgraf* Principles and Factual Scenarios Under Section 440(d)

In *Landgraf v. USI Film Products*, *supra*, the Supreme Court set out a basic test to determine whether a statute would operate "retroactively" or "retrospectively" if applied to a case pending at the time of the statute's enactment. The Court stated that the question a body must ask is "whether the provision attaches new legal consequences to events completed before its enactment." *Id.* at 1499.

The first question presented is, which cases, if any, in the agency "pipeline" are affected? The majority limits its determination to persons who have already filed applications for relief under section 212(c). There remains an open question, however, whether the amendment applies to all potential candidates for the waiver already "in the pipeline."

Arguably, the "pipeline" could include various categories of individuals who are alleged to be deportable under the pertinent sections of the statute, and who are otherwise eligible for and require the grant of a waiver under section 212(c) in order not to be deported. Assuming the main, more comprehensive group to be putative candidates who have been identified by the Immigration and Naturalization Service as deportable aliens is consistent with the *Landgraf* principles.

This could encompass aliens who are the subject of a "detainer" placed against them during their incarceration for a criminal offense as the result of a request by the Service; it could include those served with an Order to Show Cause issued by the Service; and it could

include those subject to an Order to Show Cause against whom deportation proceedings have commenced as defined under the regulations. It could include those who have filed an application for a waiver under section 212(c) in proceedings before an Immigration Judge; those who are seeking to reopen to apply for 212(c) relief; and those who have received an order from an Immigration Judge from which an appeal has been taken to the Board and/or to the circuit courts of appeal.

In particular, this Board only recently recognized decisions of the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits, which hold that the statutory language of section 212(c) makes plain that an alien may establish lawful domicile while in a status other than that of a permanent resident. *See Matter of Cazares*, Interim Decision 3262 (BIA 1996) (holding that a temporary resident under section 245A of the Act may accrue time towards 7-year lawful domicile requirement of section 212(c)). Further, the Fifth Circuit held specifically that temporary residents under both the legalization (section 245A) and special agricultural worker ("SAW") (section 210) provisions may accrue lawful domicile while in that status. *See White v. INS*, 75 F.3d 213 (5th Cir. 1996).

This Board has remanded appeals from decisions arising in those circuits to allow applications for section 212(c) to be filed and heard in the first instance or for a hearing on the merits when such was pretermitted by the Immigration Judge. The majority overlooks these cases; while not explicitly implicated in our decision today, the truncated interpretation of the majority leaves unresolved hundreds of cases of individuals who

we found to have been entitled to consideration at least under controlling circuit law, but whose applications were unlawfully pretermitted and foreclosed. In my view, such applicants are entitled to the opportunity to seek relief from deportation under section 212(c) whether or not they have a pending application on file. *See Snajder v. INS*, 29 F.3d 1203 (7th Cir. 1994).

The next question is whether the amendment applies to aliens convicted of any offense which would render them subject to deportation proceedings on charges referenced in section 212(c), as amended, and ineligible to apply for or be granted a waiver under that section. In the first published opinion on a provision of the AEDPA, the District Court of Massachusetts, construing section 440(c), posited that it was untenable that Congress could have intended that the terms of the provision apply other than to persons convicted on or after the April 24, 1996 effective date. *Demelo v. Cobb*, No. 96-10903-REK (D. Mass. June 19, 1996). Section 440(c) refers to custody requirements applicable to the exact same categories of aliens affected by the operation of section 440(d).

One difference between the language in section 440(c) and that in section 440(d) is that the plain language of section 440(c) amends section 242(a)(2) of the Act, which mandates the Attorney General to take into custody any alien "*convicted of* [the same offenses specified in amended section 212(c)] . . . upon release of the alien from incarceration." (Emphasis added.) By contrast, the language of section 440(d) amends section 212(c) to read that the provision "shall not apply to an alien who *is deportable* by reason of having committed an offense." (Emphasis added.)

As the majority states, silence cannot reasonably be interpreted as supporting a "settled expectation" of being able to engage in criminal activity without consequences. However, I part ways with the majority when they declare that individuals may not have "settled expectations" with regard to an opportunity to seek a section 212(c) waiver that affects a plea of guilty or other trial or appellate choices.

III. LANDGRAF PRINCIPLES AND MANIFEST INJUSTICE

In the absence of specific language, the reach of the statute depends upon settled expectations. This doctrine is different from, but enhanced by, that of "manifest injustice."

The human consequences of the AEDPA which are implicated by the legal question before us are compelling. I believe this is especially important to note in light of the fact that our decision today denies the requested relief from deportation. Waivers under section 212(c) are not easily obtained; to the contrary, they are perhaps the most difficult and hard won of any forms of discretionary relief over which we exercise our jurisdiction. At stake is an alien's ability to remain in this country as a permanent resident, which is determined by balancing the good of society as a whole against the individual social and humane considerations that may pertain to any one case. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

Such waiver applications are individual and fact bound, and they are properly left to the exercise of discretion by Immigration Judges in individual cases,

subject to the de novo review authority of this Board. While applicants for section 212(c) waivers share the adverse factor of having been convicted of a criminal or other immigration offense or offenses which renders them subject to deportation, they are as individual as humans can be and as human experience allows.

Applicants for waivers under section 212(c), until now, have included persons convicted of a single, possibly victimless or nonviolent crime or crimes over a discrete period of their stay in the United States, who have acknowledged their wrongdoing and changed their behavior. They include individuals who came to this country with their families as infants; adults who have neither spoken their native language nor been in their native country since childhood; fathers, mothers, and single parents of United States citizen children; businessmen and women who employ United States citizen workers in legitimate occupations; caretakers of elderly United States citizen parents; victims of domestic violence; and refugees. While they are not free of responsibility for their mistakes, they have paid, often dearly, for their transgressions in the criminal justice system, and they cannot all be said to unilaterally present a menace or threat to our society such that deportation is warranted.

I find compelling policy and practical reasons to go beyond such a limited interpretation as the one the majority proposes in this case. All of these people, and no doubt many others, had settled expectations to which they conformed their conduct. *Landgraf v. USA Film Products*, *supra*, at 1497, instructs that those "settled expectations should not be lightly disrupted." "Retroactive application of laws is undesirable where

advance notice of the change in the law would motivate a change in an individual's behavior or conduct." *Griffon v. United States Dept. of Health and Human Services*, 802 F.2d 146, 153 (5th Cir. 1986) (citing *Alexander v. Robinson*, 756 F.2d 1153 (5th Cir. 1985)).

Statutes may not be applied retroactively where doing so would result in manifest injustice to those affected. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). Here, manifest injustice would result to a significant number of legal residents, because, while otherwise eligible, their right to apply for a section 212(c) waiver will have been infringed. Moreover, I note the inevitable disparity in treatment accorded different individuals that would result, because otherwise eligible legal residents requiring a waiver have no control over when proceedings are commenced or how quickly or in what order hearings and appeals are set or adjudicated. *See Dion v. Secretary of Health and Human Services*, 823 F.2d 669, 672 (1st Cir. 1987) (finding a retroactive application inappropriate where a disparity among applicants would result).

Further, although no legal resident has the absolute right to be granted section 212(c) relief, eligible residents do have a vested right to apply and be considered for such relief. *See, e.g., Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Snajder v. INS*, *supra*, at 1207-08; *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993). For example, a respondent's counsel might have been ineffective in failing to file a section 212(c) application on behalf of an otherwise eligible respondent. *Rabiu v. INS*, *supra*. The Service may have violated a regulation denying the respondent the right to counsel. *Snajder v. INS*, *supra*; *Batanic v. INS*, *supra*. The

Immigration Judge might have wrongfully denied the respondent's motion for a change in venue that prejudiced his or her rights to a fair hearing. *Campos v. Nail*, 43 F.3d 1285 (9th Cir. 1994). The Immigration Judge might have failed to notify the respondent of relief for which he or she was apparently eligible. *Bui v. INS*, 76 F.3d 268 (9th Cir. 1996).

In any of these cases, I believe due process and fundamental fairness would dictate that we accept the case for consideration of section 212(c) relief, nunc pro tunc. Even while acknowledging the absence of statutory authority to do so, this Board has long granted nunc pro tunc relief to cure various defects in proceedings, if such treatment would dispose of a case. *Matter of Garcia*, Interim Decision 3268 (BIA 1996); *see also Matter of Lok*, 18 I&N Dec. 101, 107 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982).

IV. CONCLUSION

I would find that section 440(d) of the AEDPA operates retroactively if applied not only to pending section 212(c) applications, but to other prior events. It would attach a new legal consequence to both a pre-amendment charge or finding of deportability under most of the provisions found at section 241(a)(2) of the Act. Prior to the amendment, a person entering into plea agreements or found deportable under those sections who were otherwise eligible could rely upon an opportunity to present evidence of social and humane considerations to countervail evidence of their undesirability as a permanent resident in order to demonstrate that the granting of section 212(c) relief appeared to be in the best interest of the United States. *Matter of*

Marin, *supra*, at 584. To upset those settled expectations by retroactively applying section 440(d) of the AEDPA, without the express directive of Congress requiring such an application, attaches a new legal consequence to conduct and events already completed by April 24, 1996. It would require us to disregard the concerns articulated by the Supreme Court in *Landgraf v. USI Film Products*, *supra*, and, in my view, would contravene both practical considerations and fundamental fairness.

DISSENTING OPINION:

Fred W. Vacca, Board Member, in which Mary Maguire Dunne, Vice Chairman, Gerald S. Hurwitz, Lauri S. Filppu, and Patricia A. Cole, Board Members, joined.

I respectfully dissent.

As stated by the majority, the issue before us is to determine the effective date of section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277 (enacted Apr. 24, 1996) ("AEDPA"), and if effective on enactment, to decide which aliens who were eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (1994), are affected by the amendment. I agree with the majority's finding that general principles of statutory construction lead directly to the conclusion that the amendment took effect on the date of enactment, absent the inclusion of an alternative effective date. Therefore section 440(d) of the AEDPA applies immediately to aliens in proceedings. *See Matter of U-M-*, 20 I&N Dec. 327, 332 (BIA 1991), *aff'd*, 989 F.2d 1085 (9th Cir. 1993).

However, I part company with the remainder of the analysis employed by the majority with respect to the applicability of section 440(d) to pending applications for section 212(c) relief. I do not view the fact that Congress specifically barred pending applications for relief by alien terrorists, as set forth in section 413(g) of the AEDPA, 110 Stat. at 1269-70, to in any way dictate or even guide us in determining whether section 440(d) applies to pending section 212(c) applications. For com-

parison purposes, I cannot determine the relevant effective date from looking at the four corners of the statute to the extent that Congress employed a wide variety of effective dates throughout the AEDPA, including prospective dates. I conclude that we are compelled to apply the provisions of section 440(d) to all pending section 212(c) applications.

This Board has consistently held that an application for relief from deportation is an ongoing application. *Matter of U-M-*, *supra*, at 332. The law that applies to the application is the law that exists at the time the final administrative decision is made. *Ziffrin v. United States*, 318 U.S. 73 (1943); *Matter of U-M-*, *supra*. A final administrative decision is made when the Board renders its decision in a case on appeal or certification, or where no appeal is taken, the right to appeal is waived, or the time allotted for appeal has expired. *See Matter of Lok*, 18 I&N Dec. 101 (BIA 1981), *aff'd*, 681 F.2d 107 (2d Cir.1982); 8 C.F.R. §§ 3.1(d)(2), 3.39 (1995).

This Board has also held that an application for section 212(c) relief filed in the context of deportation proceedings is equivalent to one made at the time an alien physically seeks admission into the United States. *Matter of A-A-*, 20 I&N Dec. 492, 502 n.22 (BIA 1992). Thus, in addition to qualifying as a person whose ongoing application for relief is subject to the existing law while under administrative review, the section 212(c) applicant also stands as an individual seeking entry to the United States, and his admissibility is determined on the basis of the facts and the law that exist at the time the application is finally considered. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

Furthermore, like the majority, I find additional support for my position in *Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994). In *Landgraf* the Supreme Court stated:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.

Id. at 1501.

Prospective relief has been defined by the Supreme Court as relief that operates in futuro, such as injunctive relief. *See American Steel Foundaries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921). This is in contrast to relief that operates "retroactively," such as damages and restitution. *See Hutto v. Finney*, 437 U.S. 678, 695 n. 24 (1978).

The Supreme Court has specifically held that statutory provisions that alter or affect forms of prospective relief are to be given effect upon the effective date of the legislation and should be applied to pending suits. *American Steel Foundries v. Tri-City Central Trades Council*, *supra*, at 201; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 464 (1921); *see also Hall v. Beals*, 396 U.S. 45 (1969). The Court has further held that parties to an action do not have vested rights to prior judgments conferring forms of prospective relief while their cases remain subject to appellate review. *See American Steel Foundries v. Tri-City Central Trades Council*, *supra*; *Duplex Co. v. Deering*, *supra*; *see also Raferty V. Smith Bell & Co.*, 257 U.S. 226 (1921).

Therefore, the ultimate right to prospective relief must be determined at the time of final administrative or judicial review.

Like injunctive relief, relief from deportation under section 212(c) of the Act is prospective in nature. *See Matter of K-L-*, 20 I&N Dec. 654, 658 (BIA 1993), *aff'd*, *Lee v. INS*, 12 F.3d 1102 (8th Cir. 1993) (referring to section 212(c) relief as prospective). Under the Immigration and Nationality Act, an alien's right to benefit from a waiver under section 212(c) can only be determined at the time of a hearing and upon a finding of excludability or deportability. Relief under section 212(c) therefore operates in futuro and does not nullify the fact that the alien, prior to applying for the waiver, was either excludable or deportable. Convictions alleged to be grounds for excludability or deportability do not disappear from an alien's record for immigration purposes upon a grant of relief under section 212(c). *Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991). Hence, section 440(d) of the AEDPA amends a prospective form of relief and accordingly should be applied to all cases before this Board that remain subject to our appellate review. *See Landgraf v. USI Film Products*, *supra*; *American Steel Foundaries v. Tri-City Central Trades Council*, *supra*.

In light of the above case law, I am hard pressed to identify a basis for not applying section 440(d) of the AEDPA to all section 212(c) applications that are pending adjudication or review. The weight of authority clearly requires the Board to apply the new law, as the law was changed before a final administrative decision had been rendered. Furthermore, applying the amended section 212(c) provisions to pending appli-

cations does not offend any of the concerns underlying the retroactive operation of new statutes. *Matter of Gomez-Giraldo*, 20 I&N Dec. 957, 963 (BIA 1995).

Due to the nature of an application for a waiver under section 212(c), which is a continuous application until the conclusion of final administrative action, the effect of applying section 440(d) to pending applications is not retroactive. The only expectation an alien seeking to apply for section 212(c) waiver can rely on is that his application will be considered according to the law and facts as they stand at the time of final administrative review. In this context, it has long been true that an alien whose circumstances improve through the acquisition of an additional equity can move the Board to remand a pending matter for reconsideration of the discretionary aspect of his section 212(c) application in light of the new evidence. *Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992).

Finally, I am concerned with the majority's preferred choice of the date of filing the section 212(c) application as being determinative of which applications can be evaluated under the pre-AEDPA statutory provisions. This effective date is not contained elsewhere in the AEDPA. Moreover, there are numerous other dates that could be selected, e.g., the date the crime giving rise to the ground of deportability occurred, the date of issuance of the Order to Show Cause, the date on which a finding of deportability was rendered, and the date of filing the application.

The majority claims support for its selected effective date in the Supreme Court's analysis in *Landgraf v. USI Film Products*, *supra*. However, under *Landgraf*,

we consider whether the new statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" in determining whether a statute would have retroactive effect. *Id.* at 1505. These concerns of retroactivity, as enunciated in *Landgraf*, apply to the relevant past act. For section 440(d) purposes, this act occurs when the alien committed the crime that underlies the charge of deportability.

The majority appears to neglect this aspect of the retroactivity issue in its determination that applications filed by the date of enactment of the AEDPA are to be adjudicated under the former section 212(c) provisions so as not to unfairly disrupt the "unique expectations" of aliens at the time of filing. In my opinion, the expectations that an alien has at the time of filing an application under section 212(c) of the Act are largely irrelevant in determining whether section 440(d) of the AEDPA operates retroactively. Section 440(d) does not alter the rights an alien had at the time he committed the crime. Upon the commission of a criminal act that triggers deportability, an alien now stands, as he would have stood before, facing the prospect of criminal liability, as well as deportation from the United States. *See Scheidemann v. INS*, 83 F.3d 1517 (3d Cir. 1996).

In the face of congressional silence as to the effective date of section 440(d), the judicial default rules direct us to apply the law as of the date of enactment absent retroactive effect, which is not implicated here. The majority offers no persuasive analysis to support its

conclusion that the traditional default rules do not govern here. Accordingly, I dissent.

APPENDIX J

[logo omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

IN RE: MATTER OF BARTOLOME JHONNY SORIANO

IN DEPORTATION PROCEEDINGS

ORDER NO.

Pursuant to 8 C.F.R. § 3.1(h)(iii), the Commissioner of the Immigration and Naturalization Service has referred to me for review the decision of the Board of Immigration Appeals (BIA) in Matter of Bartolome Jhonny Soriano (A39 186 067) (July 18, 1996). I hereby grant the Commissioner's request for review and vacate the opinion of the BIA pending my further determination.

September 12, 1996 /s/ JANET RENO
Date JANET RENO
Attorney General

APPENDIX K

[seal omitted]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

Matter of Soriano, BIA. Int. Dec. No. 3289 (1996)

IN DEPORTATION PROCEEDINGS

At the request of the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals ("BIA") referred its decision in this matter pursuant to 8 C.F.R. § 3.1(h)(iii). Respondent Soriano, a native and citizen of the Dominican Republic, was admitted to the United States in 1985 as a lawful permanent resident alien. In 1992, he was convicted under New York law of the offense of an attempted sale of a controlled substance. Based on that conviction, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against him in 1994.

In 1995, Respondent sought the relief of waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c). Section 212(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *De Osorio v. INS*, 10 F.3d 1034, 1039 (4th Cir. 1993). The

Immigration Judge found that the respondent was eligible for that relief, but, in the exercise of discretion, denied his application. *See Matter of Soriano*, File No. A39 186 067 (Executive Office for Immigration Review ("EOIR"), Office of the Immigration Judge, Oct. 12, 1995). Respondent appealed from that decision on October 23, 1995.

On April 24, 1996, while Respondent's appeal was pending, the President signed into law the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of AEDPA amended INA § 212(c). The amendment provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses. Respondent's offense is among those specified.[1] Thus, a threshold issue on appeal was whether the amendment to section 212(c) applied to foreclose Respondent's application for relief from deportation.[2]

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[1] The amendment provides in relevant part that section 212(c) relief shall not be available to an alien who "is deportable by reason of having committed any criminal offense covered in (INA) section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i)." 110 Stat. at 1277, as amended by Section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C., Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. Vol. 9B (110 Stat.) 1672. Respondent's offense is covered by sections 241(a)(2)(A)(iii) and (B) of the INA. *See* 8 U.S.C. § 1251.

[2] It is important to note as a threshold matter that deportation proceedings are civil actions, and, thus, the constitutional bars to retroactive application of penal legislation do not apply. *INS v.*

The BIA was unanimous in concluding that AEDPA § 440(d) was effective immediately upon enactment on April 24, 1996. The BIA was divided, however, as to whether AEDPA § 440(d) applied to applications for section 212(c) relief that were pending on the effective date of AEDPA. Six members of the BIA concluded that Congress did not intend that aliens who had applications pending on April 24, 1996, should be barred from seeking that relief. Accordingly, they found that Respondent continued to be eligible for waiver of inadmissibility.[3] Five members of the BIA dissented. They would have held that section 440(d) did apply to pending applications for section 212(c) relief. One member of the BIA concurred in part and dissented in part. That member agreed with the majority that AEDPA § 440(d) should not be applied to pending section 212(c) applications, but would also have declined to apply it to other cases, such as those of permanent resident aliens subject to an Order to Show Cause.

For the reasons stated below, I conclude that the amendment to INA § 212(c) made by AEDPA § 440(d)

Lopez-Mendoza, 468 U.S. 1032, 1038 (1984); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (1952). Moreover, it is well settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. *Lehman v. Carson*, 353 U.S. 685, 690 (1957); *Mulcahey v. Catalanotte*, 353 U.S. 692, 694 (1957).

[3] The majority agreed with the Immigration Judge's conclusions that Respondent's attempted criminal sale of cocaine, together with his three other drug-related felonies, required a demonstration of outstanding equities before he could receive a waiver of inadmissibility, and that Respondent had not made such a demonstration.

applies to proceedings such as Respondent's, in which an application for relief under section 212(c) was pending when AEDPA was signed into law.[4]

Analysis

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court sought to "reconcile two seemingly contradictory statements found in [the Court's] decisions concerning the effect of intervening changes in the law": that "'a court is to apply the law in effect at the time it renders its decision,'" and that "'[r]etroactivity is not favored in the law.'" *Id.* at 263-64 (citations omitted).

The Court set forth the method for analyzing the temporal reach of a statute:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not

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[4] By Order dated September 12, 1996, I granted the request for review and vacated the opinion of the BIA in Matter of Bartolome Jhonny Soriano (A39 186 067).

> govern absent clear congressional intent favoring such a result.

Id. at 280.

In the present case, nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending deportation proceedings, or that it is not to be. Thus, the next task is to determine whether the statute would be given retroactive effect if applied in pending deportation proceedings. In this regard, the Court observed that "[w]hile statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70 (citation and footnote omitted).

Of particular relevance here, the Court suggested that changes in the law affecting prospective relief, as well as those affecting jurisdiction and procedure, are generally not to be considered "retroactive." Specifically, the Court said:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries v. Tri-City Central Trades Coun-*

> *cil*, 257 U.S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates *in futuro*," and that the plaintiff had no "vested right" in the decree entered by the trial court.

Id. at 273-74.

Similarly, the three separately concurring Justices (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment), emphasized that intervening law was typically applied to pending applications for prospective relief:

> Courts traditionally withhold requested injunctions t' at are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "[o]bviously, this form of relief operated only *in futuro*." Since the purpose of prospective relief is to affect the future rather than to remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.

Id. at 293 (citations omitted).

Both the majority and concurring Justices identified another set of intervening statutes—those that confer or eliminate jurisdiction—that do not operate retroactively merely because they are applied to conduct arising before the statute's enactment. Justice Scalia

explained the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction . . . by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. 286, 292-93 (Scalia, J. concurring).[5]

In summary, under *Landgraf*, a new statute does not have retroactive effect if it does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. As discussed below, the application of AEDPA § 440(d) to pending applications for section 212(c) relief does not impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of Respondent's

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[5] The single dissenting Justice in *Landgraf* was of the opinion that the presumption against retroactive legislation, "which serves to protect settled expectations," and which "is grounded in a respect for vested rights," "need not be applied to remedial legislation . . . that does not proscribe any conduct that was previously legal." *Id.* at 296-97 (Blackmun, J., dissenting) (citing *Sampeyreac v. United States*, 32 U.S. (7 Pet.) 222, 238 (1833) ("Almost every law, by providing a new remedy, affects and operates upon causes of action existing at the time the law is passed") and *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."), *cert. denied*, 449 U.S. 905 (1980)).

conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation. AEDPA § [440(d)] is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief.[6]

The relief sought in a section 212(c) application, waiver of inadmissibility, is prospective in nature. A successful applicant for relief under section 212(c) will not, as a matter of the sovereign's discretion, be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may

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[6] One formulation articulated in *Landgraf* for determining whether a statute operates retroactively—"whether [it] attaches new legal consequences to events completed before its enactment"—could be interpreted as compelling the conclusion that AEDPA § [440(d)] should not be applied to pending applications for section 212(c) relief. *Id.* at 269-70. Because the statute eliminates eligibility for a previously available form of relief from the immigration consequences of a prior criminal conviction, it could be argued that it attaches new legal consequence to a prior event. Elimination of a form of relief in this context, however, is not the same as the attachment of new legal consequences in the sense that the Court meant in *Landgraf*. If it were, most cases in the three categories that the Court identified as not constituting retroactive application when applied to past events—statutes that alter jurisdiction, procedural rules, and statutes affecting the availability of prospective injunctive relief—would also have to be understood as attaching new legal consequences to prior events and, hence, constituting retroactive application.

shed light on the respondent's right to remain."); *De Osorio v. INS*, 10 F.3d at 1042 (holding that an amendment barring applications for waivers of deportations filed after the effective date of the amendment to 212(c) is not made retroactive merely because it applies to convictions for aggravated felonies before that time: "The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief. . . . Congress did not attach additional consequences, but merely withdrew a previously available form of discretionary relief.").

Moreover, Congress's modification of section 212(c) operates to eliminate the discretionary authority of the Attorney General to grant relief in certain cases, and, thus, its effect is to remove jurisdiction. As the Solicitor General argued in the brief of the United States to the Supreme Court in *INS v. Elramly*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1260, and *vacated*, 117 S. Ct. 31 (1996), a case raising the issue whether AEDPA divested the Attorney General of authority to grant section 212(c) relief in pending cases, "[j]ust as new 'jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties,"' *Landgraf*, 511 U.S. at 274, section 212(c) speaks to the power of the Attorney General to waive deportation, not to any right of an alien to such relief." Supplemental Brief for the Petitioner at 18. The majority opinion in *Landgraf* explains the practice of applying new jurisdictional statutes to pending cases by the fact that "a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Id.* at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Here, in contrast to the cases cited by the

Court, there is no alternative tribunal to which the criminal alien may petition. Even assuming that the lack of an alternative tribunal would be relevant to retroactivity analysis where a substantive right is at stake, eligibility for a congressionally created form of purely discretionary relief from the immigration consequences of a prior criminal conviction cannot properly be characterized as a substantive right.[7]

The Third Circuit's discussion of the application of an earlier amendment to section 212(c) to make an applicant ineligible for relief based on a prior criminal conviction applies equally here:

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a

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[7] The concurring opinion further notes that while there may sometimes be an alternative forum, there is not always one, and even where there is, it may deny relief for some collateral reason such as a statute of limitations bar. "Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J. concurring).

> judicial body, these changes speak only to the power of a public agency. . . . Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that § 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of § 212(c).

Scheidemann v. INS, 83 F.3d 1517, 1523 (3rd Cir. 1996).

The Seventh Circuit has expressed a contrary view in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996), at least with respect to a narrow category of cases. In that case the petitioner had conceded deportability before the enactment of AEDPA, when he was still eligible for section 212(c) relief. The court speculated that had the petitioner known that this relief would no longer be available to him, he might have contested deportability.

> Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability. No such ignoble intention appears in the statute. Its absence is determinative under *Landgraf* because to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal

> consequence to the concession, an event that occurred before the new law came into existence.

Id. at 492-93. The court held that section 440(d) of AEDPA does not apply to cases in which deportability was conceded before AEDPA became law, "provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* at 493.[8]

Amici curiae in the current case also emphasized the reliance aliens may have placed on the availability of section 212(c) relief. Amici argue that aliens may rely on the possibility of obtaining section 212(c) relief not only when deciding whether to contest deportability, but also when deciding whether to litigate their criminal liability or enter into a plea agreement. It is true that the majority opinion in *Landgraf* notes that "familiar considerations of fair notice, reasonable reliance, and settled expectations" are factors offering "sound guidance" in "hard cases." *Landgraf*, 511 U.S. at 270. However, the Court states expressly that a statute does not operate retroactively merely because it "upsets expectations based in prior law." *Landgraf*, 511 U.S. at 270.

In any event, it is difficult to see how the possibility of obtaining section 212(c) relief would affect an alien's decision whether to concede or contest deportability. First, the criteria for determining whether someone is

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[8] The Seventh Circuit has confirmed that *Reyes-Hernandez* applies only in cases where the petitioner conceded deportability and had a colorable defense to deportability. *Arevalo-Lopez v. INS*, No. 96-1754, 1997 WL 1898, at *2 (7th Cir., Jan. 3, 1997).

deportable as a criminal alien are specific and fixed, and the grounds for challenging deportability are quite narrow. *See Rabiu v. INS*, 41 F.3d 879, 881 (2d Cir. 1994) (record of conviction sufficient to overcome alien's challenge to deportability); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995) (criminal convictions may not be collaterally challenged in deportation proceeding as ground for contesting deportability). Second, an alien need not choose between contesting deportability and seeking section 212(c) relief; an alien may pursue both.

It seems more plausible that an alien may enter a plea bargain hoping to obtain relief from deportation, but even so, the alien could not have reasonably relied upon the availability of that relief. For the past forty years, the law has been settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. Moreover, as the Supreme Court recently unanimously reaffirmed in the context of analyzing a similar provision conferring discretionary authority upon the Attorney General, "suspension of deportation [is]. . . 'an act of grace' which is accorded pursuant to her 'unfettered discretion' and is similar to 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.'" *INS v. Yueh-Shaio Yang*, 117 S. Ct. 350, 352-53 (1996) (citations omitted). Therefore, a criminal alien could not reasonably rely on the availability of section 212(c) relief in determining whether to plead guilty to a criminal offense or in determining whether to concede deportability.

Accordingly, the application of AEDPA § 440(d) to section 212(c) applications pending before the EOIR

would not be retroactive. However, to eliminate even the remote possibility that an alien who had a colorable defense to deportability may have conceded deportability in reliance on the availability of section 212(c) relief, I direct the EOIR to reopen cases upon petition by an alien who conceded deportability before the effective date of AEDPA for the limited purpose of permitting him or her to contest deportability.

CONCLUSION

For the foregoing reasons, AEDPA § 440(d) should be applied to INA § 212(c) cases pending before the EOIR on the effective date of AEDPA. EOIR shall reopen cases upon petition by an alien who conceded deportability before April 24, 1996, the effective date of AEDPA, for the limited purpose of permitting the alien to contest deportability.

Date: February 21, 1997 /s/ JANET RENO
JANET RENO
Attorney General

Supreme Court, U.S.
FILED
DEC 21 1998
OFFICE OF THE CLERK

No. 98-835

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL.,

Petitioners,

v.

RAUL PERCIRA GONCALVES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Respondent, a legal permanent resident for twenty-six years, was ordered deported based on the Attorney General's retroactive application of a 1996 amendment to the Immigration and Nationality Act (INA) that has been rejected by the First and Second Circuit Courts of Appeals, by numerous district courts, and by the Board of Immigration Appeals sitting *en banc*. The government contends that no court has jurisdiction to review the Attorney General's retroactivity decision and thereby to determine the lawfulness of respondent's final order of deportation. By insisting that Congress has repealed all statutory grants of jurisdiction to review the Attorney General's decision, the government's petition raises constitutional questions that the First Circuit deemed "novel, complex and serious" and successfully and appropriately avoided.

The questions presented are:

1. Whether the Antiterrorism and Effective Death Penalty Act (AEDPA) or the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) repealed the jurisdiction of both the district courts and the courts of appeals over a statutory and constitutional challenge to a final deportation order and, if so, whether such repeal violates the Suspension Clause, Article III or the Due Process Clause of the Constitution?

2. Whether the court of appeals correctly found that AEDPA Section 440(d) does not apply retroactively and, if applicable, whether Section 440(d) violates equal protection?

TABLE OF CONTENTS

Counter Statement of the Questions Presented i

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Counter Statement of the Case 1

1. Substantive Effects of AEDPA and IIRIRA 3

2. Judicial Review After AEPDA and IIRIRA 5

3. Substantive and Jurisdictional Analysis in the Court Below 9

Reasons for Denying the Writ 11

1. The Jurisdictional Issue is Not Worthy of Review 12

2. The Ruling on the Merits of Section 440(d) Does Not Warrant Review 21

Conclusion 28

TABLE OF AUTHORITIES

CASES:

Avelar-Cruz v. Reno, No. 98-2613 (7th Cir.) (Argued & submitted Oct. 29, 1998) 14

Avelar-Cruz v. Reno, 6 F. Supp. 2d 744 (N.D. Ill. 1998) ... 27

Bonhometre v. Reno, No. 98cv12333-NG (D. Mass.) (filed Nov. 13, 1998) 16

Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997) 6

Chamorro-Torres v. INS (No. 96-985) (filed Jan. 1997), *cert. denied*, 520 U.S. 1103 (Jan. 1997) 7

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 11, 26

Chow v. INS, 113 F.3d 659 (7th Cir. 1997) 6

Commodities Future Trading Commission v. Schor, 478 U.S. 833 (1986) 20

Daneshvar v. Chauvin, 644 F.2d 1248 (8th Cir. 1981) 5

Duldulao, 90 F.3d 396 (9th Cir. 1996) 6, 7

Esparza-Treto v. Greene, No. 98-1339 (10th Cir.) (filed Nov. 20, 1998) 17

Ex Parte Yerger, 75 U.S. (8 Wall.) 85 (1869) 10, 11, 17

Felker v. Turpin, 518 U.S. 651 (1996) 10, 11, 17, 18

Fernandez v. INS, 113 F.3d 1151 (10th Cir. 1997) ... 6, 7, 14

Francis v. INS, 532 F.2d 268 (2d Cir. 1976) 12

Galaviz-Medina v. Wooten, 27 F.3d 487 (10th Cir. 1994) . 5

Gutierrez-Martinez v. INS, No. 98-8185 ..... 14, 15

Heikkila v. Barber, 345 U.S. 229 (1953) 19

Henderson v. INS, 157 F.3d 106 (2d Cir. 1998) ..... *passim*

Hincapie-Nieto v. INS, 92 F.3d (2d Cir. 1996) 6, 7

Hose v. INS, 1998 Daily Journal D.A.R. 12215 11

Hose v. INS, 141 F.3d 932 (9th Cir. 1998) 14, 15

Hsue Li Lee v. Reno, 15 F. Supp. 2d 26 (D.D.C. 1998) 27

Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939 (1997) 11, 22, 23, 24

INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) 22, 23, 24

In re Fuentes-Campos, Int. Dec. 3318 (May 14, 1997) 4

In re Soriano, Int. Dec. 3289 (June 27, 1996) 4, 25

Jean-Baptiste v. Reno, 144 F.3d 212 (2d Cir. 1998) 17

Jurado-Gutierrez v. Greene, No. 97-1437 (10th Cir.) (no argument scheduled) 14

Jurado-Gutierrez v. Greene, 977 F. Supp. 1089 (D. Colo. 1997) 27

Katsoulis v. INS (No. 97-379) (filed Nov. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 624 (1997) 7

Kolster v. INS, 101 F.3d 785 (1st Cir. 1996) 6, 7

LaGuerre v. INS, No. 98-1954 14

Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994) 11, 22, 23, 24, 25, 27

Layne & Bowler Co. v. Western Well Works, Inc., 261 U.S. 387 (1923) 14

Lee v. Reno, 15 F.Supp.2d 26 (D.D.C. 1998) 18, 21

Lerma de Garcia v. INS, 141 F.3d 215 (5th Cir.), *reh'g denied*, 159 F.3d 1358 (1998) 9, 14, 17

Lindh v. Murphy, 521 U.S. 320 (1997) 11, 22, 23

Lindh v. Murphy, ___ U.S. ___, 117 S.Ct. 2059 (1997) 24, 26

Magaña-Pizano v. Reno, 152 F.3d 1213 (9th Cir. 1998) 13, 15, 16, 19, 27, 28

Mansour v. INS, 123 F.3d 423 (6th Cir. 1997) 6, 7

Mastrapasqua v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950) 19

Matter of Adetiba, 20 I&N Dec. 506 (BIA 1992) 2

Matter of Soriano, Int. Dec. 3289 (A.G., Feb. 21, 1997) 2, 4

Mayers v. Reno, No. 97-5537 (11th Cir.) (argued & submitted Oct. 8, 1998) 14, 15

Mojica v. Reno, 970 F. Supp. 130, 178 (E.D.N.Y., 1997) (citing U.S. Dept. of Justice Executive Office for Immigration Review Statistical Sheet 1, Jan. 19, 1995), *aff'd*, Henderson v. INS, 157 F.3d 106 (2d Cir. 1998) 3, 25, 27

Nakaranurack v. INS, 68 F.3d 290 (9th Cir. 1995) 5

Ng Fung Ho. V. White, 259 U.S. 276 (1922) 20

Pak v. Reno, No. 98-3852 (6th Cir.) (no argument scheduled) 14

Pak v. Reno, 8 F.Supp.2d 1001 (N.D. Ohio 1998) 21

Perez v. Reno, 18 F.Supp.2d 674 (W.D.Tex. 1998) 21

Qasguargis v. INS (No. 96-806) (filed Jan. 1997), *cert. denied*, 519 U.S. 1148 (Feb. 1997) 7

Reno v. ADDC, No. 97-1252 (11th Cir.) (argued Nov. 4, 1998) 8, 16

Reyes-Hernandez v. INS, 89 F.3d 490 (7th Cir. 1996) 20

Richardson v. Reno, No. 98-4320, 1998 WL 850045 (11th Cir. Dec. 9, 1998) 15

Rodriguez-Roman v. INS, 98 F.3d 416 (9th Cir. 1996) 20

Salazar-Haro v. INS, 95 F.3d 309 (3d Cir. 1996) 6, 7

Sandoval v. Reno, No. 97-7298, WL 839465 (E.D. Pa. 1997) 21

Sandoval v. Reno, 1997 WL 839465, at *11 (E.D. Pa. 1997) 25

Sandoval v. Reno, No. 98-1099 (3d Cir.) (argued & submitted Sept. 28, 1998) 14

Shah v. Reno, No. 98-2636 (8th Cir.) (argument scheduled for Jan. 13, 1999) 14

Swain v. Pressley, 430 U.S. 372 (1997) 20

Thompson v. Perryman, No. 98C1596, 1998 U.S. Dist. LEXIS 12527, at *30 (N.D. Ill. Aug. 5, 1998) 27

Turkhan v. INS, 123 F.3d 487 (7th Cir. 1997) 6, 9, 14, 17

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) 19

United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957) 19

United States ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489 (2d Cir. 1950) 19

Wallace v. Reno, No. 98-11182-NG, 1998 U.S. Dist. LEXIS 16807 (D. Mass. Oct. 7, 1998) 27

Williams v. INS, 795 F.2d 738 (9th Cir. 1986) 5

Williams v. INS, 114 F.3d 82 (5th Cir. 1997) 7

Wong Yung Sung v. McGrath, 339 U.S. 33 (1950) 20

STATUTES AND CONSTITUTIONAL PROVISIONS:

United States Code
8 U.S.C. § 1105a 5, 6, 7, 8
8 U.S.C. § 1105a(a) (1994) 5
8 U.S.C. § 1105a(a)(10) (1994) 5, 6, 18
8 U.S.C. § 1182(c) 2, 12, 13, 21, 22, 23
8 U.S.C. § 1229b 4, 22
8 U.S.C. § 1252(a)(2)(C) 9
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2241 ..... *passim*
28 U.S.C. § 2241(c)(1) and (c)(3) 10

Antiterrorism and Effective Death Penalty Act (AEDPA)
Section 413 ..... 25, 26
Section 421 ..... 25, 26
Section 435(b) 25
Section 440(a) 6
Section 440(d) ..... *passim*
Section 440(f) 25
Section 441(b) 25

Illegal Immigration Reform and Immigrant
Responsibility Act (IIRIRA) i
IIRIRA 304(b) 22
IIRIRA 306(c) 8
IIRIRA 309 (a) & (c) 8
IIRIRA 309(a),(c)(1) & (4) 8
IIRIRA 309(c)(4) 15, 16
IIRIRA 309(c)(4)(G), 110 Stat. 3009-626 ..... 9, 13, 15, 16, 17

Immigration and Nationality Act (INA) i

1252 7
1252(a)(2)(C) 9, 16
1252(g) 8, 15, 16, 18

OPINIONS BELOW

Respondent adopts the petitioner's statement of the opinions below.

JURISDICTION

Respondent does not contest this Court's jurisdiction under 28 U.S.C. § 1254(1).

COUNTER STATEMENT OF THE CASE

Respondent, Raul Percira Goncalves, is a citizen of Portugal who has been a legal permanent resident of the United States for twenty-six years. He lawfully entered the United States with his parents and siblings as a three-year old child. C.A. App. 45-46.[1] His father died when respondent was five (C.A. App. 46, 71), and he was raised by his mother who is afflicted with a mental illness diagnosed as schizoaffective disorder. C.A. App. 29, 47, 71. Respondent is an alcoholic. In June of 1992, he acknowledged his alcoholism, began attending Alcoholics Anonymous (AA), and earned his General Equivalency Diploma. C.A. App. 55, 104. He has been employed in construction since 1994, remains sober and continues to attend AA meetings. C.A. App. 55-58, 79. Respondent is married to a United States citizen, has an American-born child, has never returned to Portugal and has no immediate family there. C.A. App. 7, 45, 67.

In 1990, before the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA) was enacted, the INS commenced deportation proceedings against respondent based on his convictions of two or

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[1] As in the government's petition, "C.A. App." refers to the record appendix filed in the court below.

more (non-violent) crimes of moral turpitude. Pet. App. 6a. Respondent conceded deportability in 1994. He was eligible for and submitted a request for relief from deportation under Section 1182(c). The Immigration Judge (IJ) denied the application in the exercise of discretion, and respondent timely appealed to the Board of Immigration Appeals (BIA) in 1995, which exercises discretion *de novo* under Section 1182(c). *See Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992).

While the application was pending before the BIA, Congress enacted AEDPA. In March 1997, the BIA dismissed respondent's appeal pursuant to the Attorney General's decision in *Matter of Soriano*, which applied Section 440(d)[2] retroactively, and issued a final order of deportation on the ground that respondent's eligibility for relief had been eliminated by AEDPA. Respondent was taken into custody for deportation in June 1997.[3]

This case concerns substantive and jurisdictional amendments to the Immigration and Nationality Act (INA) made in 1996 by AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, affecting legal permanent resident immigrants who are deportable based on certain criminal convictions.

The substantive issues are whether changes in statutory eligibility criteria for relief from deportation apply retroactively to applications that were pending when the amendments were enacted and whether the restrictions on relief create a distinc-

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[2] All references to Section 440(d) of AEDPA include technical amendments made by IIRIRA Section 306. These amendments were effective as if included in AEDPA, and without them Mr. Goncalves would have retained eligibility for relief as his crimes were not committed within five years of entry. Pet. App. 87a-88a.

[3] Respondent was released from immigration custody on May 28, 1998.

tion that violates equal protection. The jurisdictional issue is whether Congress repealed all federal court jurisdiction over the statutory retroactivity and the constitutional equal protection challenges to respondent's deportation order and, if so, whether such repeal violates the Constitution.

1. Substantive Effects of AEDPA and IIRIRA.

Prior to the enactment of AEDPA, a legal permanent resident could apply for relief from deportation in the event certain criminal acts rendered him deportable. 8 U.S.C. § 1182(c) (1994). Although the ultimate grant of relief was left to the discretion of the Attorney General, if the legal resident had resided in the United States for seven consecutive years and was not convicted of an "aggravated felony" for which he had actually served five years, he had a statutory entitlement to apply. *Id.* Furthermore, the grant of relief was not uncommon. From 1989 to 1994 over half of the applications for relief were approved. *Mojica* v. *Reno*, 970 F. Supp. 130, 178 (E.D.N.Y., 1997) (citing U.S. Dept. of Justice Executive Office for Immigration Review Statistical Sheet 1, Jan. 19, 1995), *aff'd*, *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998).

In 1996, AEDPA 440(d) expanded the prohibition on eligibility for relief by adding a wide range of disqualifying criminal convictions.[4] Respondent was eligible to apply for Section 1182(c) relief under the pre-AEDPA provision and was precluded from eligibility under the prohibition enacted by Section 440(d).

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[4] Section 440(d) of AEDPA amended Section 1182(c) to provide that an alien who "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241 (a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" is not eligible for relief.

Continued eligibility for relief from deportation for respondent depends upon whether the new restrictions on eligibility apply retroactively to immigrants who applied for relief before AEDPA was enacted. The BIA ruled en banc on that question. In a precedent decision applicable to all cases, it held that Section 440(d) did not apply retroactively to applications pending when AEDPA was enacted. *In re Soriano*, Int. Dec. 3289 (June 27, 1996). Pet. App. 91a. At the request of the INS the Attorney General vacated the BIA's decision. Pet. App. 124a. Five months later she issued a nationally-applicable ruling that AEDPA's new restrictions applied to all cases, including those where "an application was pending when AEDPA was signed into law." *Matter of Soriano*, Int. Dec. 3289 (A.G., Feb. 21, 1997). Pet. App. 128a.

Section 440(d), which refers only to "deportable" aliens, also raised the question of whether it applies to immigrants subject to "exclusion" rather than "deportation" proceedings. The BIA held, in a different proceeding, that the plain words of Section 440(d) restricted its coverage to deportable aliens. *In re Fuentes-Campos*, Int. Dec. 3318 (May 14, 1997).

Five months after AEDPA, Congress enacted IIRIRA. It went into effect on April 1, 1997. On its effective date, IIRIRA repealed the underlying provision amended by Section 440(d) (INA Section 1182 (c)) and replaced it with a new form of relief from deportation entitled "cancellation of removal". 8 U.S.C. § 1229b.[5]

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[5] "Cancellation of removal" applies to aliens against whom administrative deportation (now removal proceedings) are commenced beginning April 1, 1997. Section 1229b provides:

"(a) Cancellation of Removal for Certain Permanent Residents"

> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien-

2. Judicial Review After AEPDA and IIRIRA

AEDPA and IIRIRA also amended the INA provisions regarding federal court jurisdiction to review deportation and exclusion orders. Before AEDPA and IIRIRA, judicial review of final orders of deportation and exclusion was governed by 8 U.S.C. § 1105a. Section 1105a provided that any alien subject to a final order of deportation, regardless of the basis for the order, was entitled to obtain judicial review by a petition for review directly in the court of appeals, 8 U.S.C. § 1105a(a) (1994), or by habeas corpus proceedings if the alien was held in custody. 8 U.S.C. § 1105a(a)(10) (1994). The habeas corpus provision was in addition to the direct review procedure, and the courts disagreed about when an alien could invoke habeas corpus.[6]

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(1) has been an alien lawfully admitted for permanent residence for not less than five years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony."

Permanent residents' eligibility for "cancellation of removal" under IIRIRA is less restrictive in some respects than eligibility for Section 1182 (c) under AEDPA because IIRIRA excludes only "aggravated felony" convictions.

[6] Compare *Nakaranurack* v. *INS*, 68 F.3d 290 (9th Cir. 1995) (finding habeas jurisdiction to review denial of discretionary relief in final deportation order) and *Williams* v. *INS*, 795 F.2d 738 (9th Cir. 1986) (same), with *Galaviz-Medina* v. *Wooten*, 27 F.3d 487 (10th Cir. 1994) (limiting habeas jurisdiction to constitutional claims regarding collateral matters), and *Daneshvar* v. *Chauvin*, 644 F.2d 1248 (8th Cir. 1981) (limiting habeas jurisdiction to review of discretionary decisions in collateral matters).

a. AEDPA amended the Section 1105a jurisdictional provisions of the INA in two ways. First, it repealed the habeas corpus provision in Section 1105a(a)(10). Second, it enacted a new provision stating that a final order against an alien deportable on certain criminal grounds "shall not be subject to review by any court." AEDPA 440(a). AEDPA's provisions went into effect upon enactment on April 24, 1996. Based on that provision, the First Circuit and other courts of appeals dismissed pending petitions for review on the ground that Congress had repealed their direct review jurisdiction.[7]

The government does not mention that the INS sought dismissal of these cases on the ground that the circuit courts no longer had jurisdiction and that immigrants objected to dismissal because denial of direct review would violate their constitutional right to a judicial forum for challenging their deportation orders. *See, e.g., Kolster*, 101 F.3d at 790-91.[8] In the First Circuit, the INS affirmatively stated that it would assume that the district courts retained jurisdiction to review some claim in a habeas corpus proceeding.[9] In other circuits, the INS sought dismissal of cases raising constitutional claims. *See Chow* v. *INS*, 113 F.3d 659, 668 (7th Cir. 1997). In response to the

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[7] See *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996). See also *Mansour* v. *INS*, 123 F.3d 423 (6th Cir. 1997); *Turkhan* v. *INS*, 123 F.3d 487 (7th Cir. 1997); *Fernandez* v. *INS*, 113 F.3d 1151 (10th Cir. 1997); *Salazar-Haro* v. *INS*, 95 F.3d 309 (3d Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27 (2d Cir. 1996).

[8] See also *Mansour*, 123 F.3d at 25-26; *Turkhan*, 123 F.3d at 489-90; *Fernandez*, 113 F.3d at 1154-55; *Boston-Bollers* v. *INS*, 106 F.3d 352, 354 (11th Cir. 1997); *Duldulao*, 90 F.3d 396, 399-400 (9th Cir. 1996); *Salazar-Haro*, 95 F.3d at 310-11; *Hincapie-Nieto*, 92 F.3d at 30-31.

[9] The INS did not specify the statutory basis for habeas review in the district courts.

INS's arguments, the circuit courts dismissed petitions for review, but found that the elimination of their own direct review did not foreclose all avenues for an immigrant to challenge a deportation order because of the possibility of alternative avenues, including habeas corpus, for judicial intervention. *See Kolster*, 101 F.3d at 790.[10] In several cases, immigrants sought review by this Court of the circuit courts' dismissals based on their constitutional right to judicial review under various constitutional provisions, including the Suspension of Habeas Corpus Clause. The government opposed *certiorari* on the ground, *inter alia*, that any claim for review under the Suspension of Habeas Corpus Clause should await the filing of a habeas corpus petition.[11]

b. IIRIRA enacted further changes to the INA's judicial review provisions. For administrative proceedings commenced on or after IIRIRA's effective date, April 1, 1997, it repealed Section 1105a and adopted a new permanent judicial review statute, Section 1252. The permanent provision and the various subsections cited by the government (with the arguable exception of subsection (g)) *see* Pet. Br. 5, apply *only* to cases where the immigration proceeding is initiated on or after April 1,

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[10] See also *Mansour*, 123 F.3d at 425-26; *Williams* v. *INS*, 114 F.3d 82, 83-84 (5th Cir. 1997); *Fernandez*, 113 F.3d 1155; *Chow* v. *INS*, 113 F.3d 659, 668-69 (7th Cir. 1997); *Salazar-Haro*, 95 F.3d at 311; *Hincapie-Nieto*, 92 F.3d at 30-31; *Duldulao*, 90 F.3d at 399-400.

[11] The government argued in opposition to *certiorari* that a claim that the Suspension of Habeas Corpus Clause provided immigrants with a constitutional right to review of their claims was not properly presented because petitioners "ha[d] not sought a writ of habeas corpus." Brief for the Respondent [INS] in Opposition at 9, *Qasguargis* v. *INS* (No. 96-806) (filed Jan. 1997), *cert. denied*, 519 U.S. 1148 (Feb. 1997); Brief for the [INS] at 15, *Chamorro-Torres* v. *INS* (No. 96-985) (filed Jan. 1997), *cert. denied*, 520 U.S. 1103 (Jan.1997) (same); Brief for the [INS] at 23, *Katsoulis* v. *INS* (No. 97-379) (filed Nov. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 624 (1997) (same).

1997.[12] For those cases (if the BIA issues its final order after October 30, 1996),[13] IIRIRA enacted "transitional" judicial review rules amending the existing Section 1105a judicial review procedures. Both the permanent and transitional provisions of IIRIRA preserve the courts of appeals as the primary route for judicial review of final orders of deportation or removal.

IIRIRA restricts review of deportation orders based on enumerated criminal grounds. The transitional rules provide:

> there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in [enumerated INA sections].

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[12] IIRIRA 309 (a) & (c). One subsection of the permanent judicial review statue has a separate effective date provision. Section 1252(g) provides:

(g) Exclusive jurisdiction

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

IIRIRA 306(c) provides that:

"subsection (g) of section ([1252] . . .), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act." In a different context the applicability of Section 1252(g) to pending cases is presented in *Reno* v. *AADC*, No. 97-1252 (9th Cir.) (argued Nov. 4, 1998).

[13] Section 309(a), (c)(1) & (4).

IIRIRA 309(c)(4)(G). The successor provision in the permanent IIRIRA statute appears at 8 U.S.C. § 1252(a)(2)(C).[14]

Based on this provision, the courts of appeals reiterated their earlier rulings that their own jurisdiction over petitioner for review, including constitutional claims, had been repealed.[15] The government again fails to note that the courts of appeals dismissed petitions for review over the objection of immigrants that elimination of such review would violate their constitutional right to a judicial forum to present constitutional and non-constitutional claims. The government now contends constitutional equal protection claims are reviewable in the courts of appeals. *Compare* Pet. 19-20 with *Goncalves*, Pet. App.10a The courts noted that alternative grounds for seeking review, in particular in district court habeas corpus actions, was not foreclosed.

3. Substantive and Jurisdictional Analysis in the Court Below.

Respondent filed a writ of habeas corpus under 28 U.S.C. § 2241 to challenge the order of deportation. He asserted that (1) the Attorney General's ruling in *Soriano* erred as a matter

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[14] Section 1252(a)(2)(C):

"ORDERS AGAINST CRIMINAL ALIENS.- Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(I)."

[15] See, e.g., *Lerma de Garcia* v. *INS*, 141 F.3d 215, 217 (5th Cir.), *reh'g denied*, 159 F.3d 1358 (1998); *Turkhan* v. *INS*, 123 F.3d 487, 490 (7th Cir. 1997).

of law in holding that AEDPA 440(d) applied retroactively to applications for relief filed before AEDPA's enactment, and (2) irrespective of whether Section 440(d) applies retroactively, that it violates Equal Protection by depriving deportable but not excludable legal resident immigrants of eligibility for discretionary relief. The district court dismissed the petition, finding that it lacked jurisdiction and that respondent's claims were not meritorious. Pet. App. 75a.

In the court of appeals, the INS asserted that no court had jurisdiction over either claim. It argued that respondent's retroactivity claim could not be heard in either the district court in a habeas corpus action or in the court of appeals by petition for review. In addition, contrary to its position here, the INS asserted that both the district court and the court of appeals lacked jurisdiction over respondent's constitutional equal protection claim because direct review in the court of appeals remained only for "substantial" constitutional claims causing a fundamental miscarriage of justice and that respondent's claim was not substantial. Pet. App. 18a-19a. The First Circuit, finding that "serious, novel and complex constitutional issues," Pet. App. at 28a, would be presented if respondent's claims were not reviewable, avoided the constitutional issues by finding that under the express repeal rule of *Felker* v. *Turpin*, 518 U.S. 651 (1996) and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), IIRIRA had not repealed district court jurisdiction under 28 U.S.C. § 2241 to hear both of respondent's claims.

The court of appeals found that the respondent's petition "raised pure issues of law". Pet. App. at 11a. It reaffirmed its prior holding that IIRIRA had repealed the circuit courts' direct review jurisdiction, but held IIRIRA had not repealed district court jurisdiction under 28 U.S.C. § 2241 to hear both of respondent's claims. The court stressed "there is no question that . . . Section 2241 provides a basis for reviewing immigration decisions" Pet. App. 21a, that the language of 2241(c)(1) and (c)(3) encompasses respondent's claims, and that Congress had

not repealed Section 2241 in light of the express repeal rule of *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869).

On the merits, the court of appeals gave deference to the Attorney General's interpretation under *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), but held that the Attorney General had erred. The First Circuit applied *Landgraf* v. *U.S.I. Film Products*, 511 U.S. 244 (1994), as clarified in *Hughes Aircraft Co.* v. *U.S. ex rel. Schumer*, 520 U.S. 939 (1997), and *Lindh* v. *Murphy*, 521 U.S. 320 (1997), and, using "traditional tools of statutory construction," Pet. App. 41a, found that the language and structure of AEDPA, as confirmed by the legislative history, demonstrated that Section 440(d)'s new restrictions on relief did not apply to pending applications.[16]

REASONS FOR DENYING THE WRIT

Review is not warranted because there is no conflict among the circuits on either the jurisdictional question[17] or the retroactivity of Section 440(d), because both issues arise from interim statutory provisions that apply only to transitional cases governed by expiring substantive and jurisdictional statutes, and because the court of appeals decision was correct on both the jurisdiction and the merits and thereby properly avoided constitutional issues with respect to both parts of the case.

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[16] The Second Circuit in *Henderson* v. *INS*, 157 F.3d 106, 129 (2d Cir. 1998), agreed that Congress did not intend Section 440(d) to apply retroactively to applications for relief pending when the law changed, or to immigrants placed into proceedings before the date.

[17] As discussed below, the Ninth Circuit has, since the filing of the government's petition, withdrawn the panel opinion in *Hose* v. *INS*, 1998 Daily Journal D.A.R. 12215.

The First Circuit's ruling avoided constitutional questions concerning the right to judicial review and the scope of such review under the Suspension Clause, Article III and due process by placing jurisdiction in the district court pursuant to 28 U.S.C. § 2241. The instant setting, involving temporary INA rules whose provisions are sufficiently uncertain that the government itself has wavered in their interpretation, is not an appropriate vehicle for the Court to consider far reaching constitutional questions of Congress's power to limit judicial review of executive detention that would arise if Congress had repealed all grants of jurisdiction, including Section 2241. The First Circuit's merits decision that Section 440(d) does not apply retroactively to a now-repealed provision of the INA is based on the established tests for determining retroactivity and avoids questioning the constitutionality of Section 1182(c) under the equal protection standard that the courts of appeals have uniformly applied to that provision since 1976.[18]

1. The Jurisdictional Issue is Not Worthy of Review.

The jurisdictional question is whether *any* court, and if so which court, has jurisdiction over a pure question of statutory construction adopted by the Attorney General that imposes a rule of general applicability governing deportation proceedings and mandating the deportation of longtime legal residents of the United States. The government now concedes, contrary to its position below, that the court of appeals (but not the district court) has jurisdiction over respondent's constitutional equal protection claim. But the government asserts that *no court* may review the Attorney General's decision (held to be erroneous by the First and Second Circuits and numerous district courts) that Section 440(d) applies retroactively to deprive respondent

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[18] See *Francis* v. *INS*, 532 F.2d 268, 272 (2d Cir. 1976).

of *statutory eligibility* for relief from deportation. The government agrees that respondent was eligible for relief from deportation under Section 1182(c) when he applied and that the BIA is required to exercise *de novo* discretion over respondent's claim if he remains eligible. The government insists, nonetheless, that no court can hear whether the Attorney General adopted an incorrect rule of law that deprives respondent of the statutory entitlement to apply for relief. The First, Second, and Ninth Circuits have uniformly rejected that jurisdictional contention.

The government's objection to placing review in the district courts fails to note that the INS consistently sought dismissal of petitions for review (even in cases with constitutional claims where it now concedes that court of appeals jurisdiction is proper) over the objection of immigrants seeking to preserve that route, that it moved for dismissal in the First Circuit on the assumption that habeas corpus provided an alternative avenue for review, that it opposed resolution by this Court of the rights guaranteed by the Suspension Clause until immigrants filed habeas corpus actions, and that it has not offered a construction of Section 309(c)(4)(G) that allows judicial review of respondent's generic statutory claim of general applicability without resolution of complex constitutional questions of historic dimension.

a. There is no conflict among the circuit courts on either of the two jurisdictional questions the government presents: whether respondent may litigate his retroactivity and equal protection claims and, if so, in what forum those claims may be brought. Pet. Br. at 6-7. Three courts of appeals, the First, Second, and Ninth, have squarely addressed both questions and agree that immigrants subject to a final order of deportation are entitled to judicial review of both the statutory and constitutional claims. All three courts also held that the proper forum is the district court pursuant to 28 U.S.C. § 2241. *See* Pet. App. 1a; *Magaña-Pizano* v. *INS*, 152 F.3d 1213 (9th Cir.1998);

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Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998). Six additional courts of appeals are now considering habeas corpus appeals that raise the identical jurisdictional (and merits) claims as are presented here.[19] Consideration by this Court is premature unless and until an actual conflict between the circuits emerges.[20] *Cf. Layne & Bowler Co.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

The only appellate decision that the government contends presents a conflict is the Ninth Circuit's panel opinion in *Hose* v. *INS*, 141 F.3d 932 (9th Cir. 1998). However, subsequent to the filing of the government's petition for certiorari, the Ninth Circuit withdrew its opinion and granted rehearing en banc in

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[19] *LaGuerre* v. *INS*, No. 98-1954 and *Avelar-Cruz* v. *Reno*, No. 98-2613 (7th Cir.) (Argued & submitted Oct. 29, 1998); *Gutierrez-Martinez* v. *INS*, No. 98-8185 and *Mayers* v. *Reno*, No. 97-5537 (11th Cir.) (argued & submitted Oct. 8, 1998); *Sandoval* v. *Reno*, No. 98-1099 (3d Cir.) (argued & submitted Sept. 28, 1998); *Shah* v. *Reno*, No. 98-2636 (8th Cir.) (argument scheduled for Jan. 13, 1999); *Jurado-Gutierrez* v. *Greene*, No. 97-1437 (10th Cir.) (no argument scheduled); *Pak* v. *Reno*, No. 98-3852 (6th Cir.) (no argument scheduled).

[20] Numerous courts of appeals have previously stated that the only remaining forum is in the district courts. Each held that AEDPA and IIRIRA repealed the courts of appeals' direct review jurisdiction over claims by immigrants deportable for a criminal conviction who challenge the denial of relief from deportation, stated or assumed that habeas corpus jurisdiction (or other avenue) remained available, and invited or instructed immigrants to seek review through such an action. See, e.g., *Lerma de Garcia* v. *INS*, 141 F.3d 215, 217 (5th Cir.), *reh'g denied*, 159 F.3d 1358 (1998) (noting that "criminal deportees retain some opportunity to apply for writs of habeas corpus."); *Turkhan* v. *INS*, 123 F.3d 487, 490 (7th Cir. 1997) (mentioning "possibility of a writ of habeas corpus authorized under" section 2241, the All Writs Act or the Suspension Clause of the Constitution); *Fernandez* v. *INS*, 113 F.3d 1151 (10th Cir. 1997) (observing that the "possibility that habeas jurisdiction exists under Section 2241" remains "open").

Hose, with argument scheduled for March 25, 1999. 1998 Daily Journal D.A.R. 12215 (Dec. 3, 1998). Thus, the only circuit conflict identified by petitioner has been eliminated.[21]

b. As a case arising under IIRIRA's temporary "transitional" judicial review rules, this case does not present the permanent judicial review provisions of IIRIRA and does not raise questions of national importance warranting this Court's review.

This case is governed by the transitional jurisdictional provision, IIRIRA 309(c)(4) and, according to the government,

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[21] The *Hose* decision never presented an actual conflict regarding the jurisdictional issues presented here because *Hose* did not involve the availability of habeas corpus where direct review was statutorily barred. Even before being withdrawn, *Hose* was of no practical significance because the Ninth Circuit ruling in *Magaña-Pizano* resulted in the district courts retaining jurisdiction under 28 U.S.C. § 2241 to review challenges brought by immigrants who cannot obtain direct review under IIRIRA 309(c)(4)(G).

In the circuit courts, the government has submitted *Richardson* v. *Reno*, No. 98-4320, 1998 WL 850045 (11th Cir. Dec. 9, 1998), to support its contention that the district courts lack jurisdiction under Section 2241. *Richardson*, however, is not about review of final orders of deportation because the petitioner in *Richardson* was challenging his detention pending the outcome of his removal proceeding and not a final order. His removal case remains pending in the BIA and no final order of deportation has issued. The Eleventh Circuit's discussion regarding the availability of Section 2241 to review final orders of deportation is therefore entirely dicta. Further, the Eleventh Circuit specifically noted that it was not addressing the scope of review required by the Suspension Clause. See *id.* at *30 n. 182. The jurisdictional questions resolved by the First Circuit in this case remain pending in the Eleventh Circuit in *Gutierrez-Martinez* v. *Reno*, No. 98-8185 and *Mayers* v. *Reno*, No. 97-5537 (11th Cir.) (argued and submitted Oct. 8, 1998). Those consolidated cases involve the identical jurisdictional and merits issues as presented in this case, *Magaña-Pizano* v. *INS*, 152 F.3d 1213 (9th Cir. 1998) and *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998).

one subsection of the permanent provision, Section 1252(g). The rest of the permanent provision does not apply here because this is a "pipeline" deportation case where the administrative proceedings were commenced *before* April 1, 1997. Under IIRIRA, such pipeline deportation (and exclusion) cases are governed by the transitional rules and are not subject to the permanent provision.[22]

The government argues that the permanent counterpart to the applicable transitional provision, Section 1252 (a)(2)(C), is "substantively similar" and that the "courts in the future are *likely* to construe" (Pet. Br. at 19 n.10 (emphasis added)), the permanent provision in light of their interpretation of the transitional rule. But the text of the two provisions is different, and the government has already argued in other cases that judicial decisions under Section 309(c)(4)(G) do not govern the Section 1252(a)(2)(C) permanent provision.[23]

c. The jurisdictional ruling of the court of appeals avoided multiple "serious, novel and complex" constitutional issues.

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[22] Transition cases are also complicated by the intersection of Section 1252(g) and Section 309(c)(4). The interplay of those provisions arises, in a different context, in *Reno* v. *American-Arab Anti-Discrimination Committee*, No. 97-1252 (*AADC*), (argued Nov. 4, 1998). In light of the potential relevance of *AADC*, the Court may wish to hold this petition until it decides *AADC*. *AADC* does not raise the same question as is presented here nor does it, as petitioner correctly states, involve the continued availability of habeas corpus or any question arising under the Suspension Clause. Nonetheless, the Court's analysis of Section 1252(g) in *AADC* may give guidance to the parties on the scope and applicability of that statute in a transitional rule case.

[23] See, e.g., Brief for Respondent-Appellee [INS] at 17-18 n.10, *Esparza-Treto* v. *Greene*, No. 98-1339 (10th Cir.) (filed Nov. 20, 1998) (*Magaña-Pizano* is 'clearly limited to cases under the transitional rules and does not apply to cases under new Section 242") *Bonhometre* v. *Reno*, No. 98cv12333-NG (D. Mass.) (filed Nov. 13, 1998) (asserting that *Goncalves* governs only transitional rule cases).

Pet. App. 28a. The court explained the constitutional problems as (1) the absence of judicial review in relation to the limits of Congress' power under Article III to control the jurisdiction of the federal courts; (2) deciding whether the Suspension Clause permits Congress to repeal Section 2241 review of detention by Executive Branch officers; (3) whether the Suspension Clause unaided by statute provides jurisdiction; and (4) the kinds of claims that would be permitted directly under Suspension Clause jurisdiction. Pet. App. at 28a-29a.

The government tries to avoid these constitutional issues by arguing, without explanation, that Section 309(c)(4)(G) could be "construed" to allow jurisdiction over *constitutional* claims directly in the court of appeals by a petition for review. But even if construing Section 309(c)(4)(G) to allow review of constitutional claims were possible, doing so does not avoid the constitutional questions. The constitutional issue presented by the jurisdictional provisions of AEDPA and IIRIRA is whether judicial review of respondent's *non-constitutional* question of generally applicable statutory interpretation (i.e., whether the statute applies retroactively) can be barred. Construing IIRIRA to allow review of constitutional claims does nothing to avoid that constitutional question.

Given that serious constitutional question, the court of appeals correctly relied on *Felker* v. *Turpin*, 518 U.S. 651 (1996), and *Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) to find that Congress had not repealed Section 2241. Pet. App. 20a-30a.[24] The First Circuit reviewed the relevant legislative enactments under the *Felker* test. It found that the 1961 legislation did not repeal Section 2241. The legislative history (though limited) confirmed an intent to preserve Section 2241, and the case law after 1961 showed that Section 2241 remained available to

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[24] Other circuit courts have reached the same conclusion. See, e.g., *Jean-Baptiste* v. *Reno*, 144 F.3d 212 (2d Cir. 1998); *Lerma de Garcia* v. *INS*, 141 F.3d 215 (5th Cir.), *reh'g denied*, 159 F.3d 1358 (1998); *Turkhan* v. *INS*, 123 F.3d 487 (7th Cir. 1997).

immigrants facing deportation. Pet. App. 24a-26a. It further found that AEDPA did not effectuate a repeal of Section 2241 because it made no mention of that provision and only eliminated the independent basis for district court habeas corpus actions that had appeared in former Section 1105a(a)(10). See Pet. App. 26a. Finally, the First Circuit concluded that IIRIRA's enactment of Section 1252(g) was not sufficient to repeal Section 2241 because it also failed to mention Section 2241 or habeas corpus. Pet. App. 26a-28a. In particular, the court noted Congress enacted Section 1252(g) after this Court's unanimous and closely-watched *Felker* opinion, thus removing any possible doubt that Congress knew of the necessity for explicit legislation to amend or repeal jurisdiction under Section 2241.[25] Pet. App. 26a.

Application of the *Felker* clear statement rule in this case is appropriate to avoid the historic constitutional questions that the Court would otherwise confront. The clear statement rule of *Felker* is not a formalistic requirement. It acts as a "signpost[], warning Congress that specific types of legislation, such as acts that . . . strip the courts of all jurisdiction, may give rise to constitutional difficulties." *Lee* v. *Reno*, 15 F.Supp. 2d 26, 38 (D.D.C. 1998).

d. Nor are the constitutional questions easy ones, as the government seems to suggest. The constitutional basis for judicial review of respondent's statutory retroactivity and constitutional equal protection claims lies in the Suspension of Habeas Corpus Clause, the Separation of Powers principle of Article III, and the Due Process Clause of the Fifth Amendment. The government asserts that denying review of a statutory claim

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[25] The lack of certainty in AEDPA and IIRIRA is also evidenced by the fact that, as the court below noted, the government itself initially assumed that constitutional-mandated review would be conducted by the district court in the context of a habeas corpus petition. Pet. App. 10a (INS "conceded that there would be some form of habeas jurisdiction in the district court"). See *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998).

governing discretionary relief raises no constitutional issue. Pet. Br. at 21. That is contradicted by decades of consistent judicial adjudication of such claims in habeas corpus proceedings, including by this Court. Habeas corpus is the historic procedure for an alien to challenge an order of deportation. *See Heikkila* v. *Barber*, 345 U.S. 229, 235 (1953) ("Now, as before, [an alien] may attack a deportation order only by habeas corpus"). Under the immigration acts of 1891 and 1917, the statute prohibited judicial review except as "required by the Constitution." *Heikkila*, 345 U.S. at 235. Throughout that period, however, the courts adjudicated habeas corpus actions by resident aliens alleging that a denial of discretionary relief was erroneous because it rested on a misconstruction of the immigration statute, or some other non-constitutional error.

This Court twice reviewed the denial of discretionary deportation relief for *non-constitutional* error shortly after the Court affirmed in *Heikkila* that the habeas review was limited to the constitutional core. *See United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 268 (1954); *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957). *Accardi* is especially significant because the Court exercised habeas jurisdiction to review the denial of discretionary relief and granted relief to the immigrant over the specific objection of four dissenting Justices that habeas corpus jurisdiction did not extend to claims arising from discretionary relief. *See Accardi*, 340 U.S. at 269 (Jackson, J., dissenting).[26] The government has not pointed to a single decision of this Court holding that review of legal error governing eligibility for discretionary relief from

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[26] The courts of appeals routinely reviewed claims denying discretionary relief during this period. See, e.g., *Mastrapasqua* v. *Shaughnessy*, 180 F.2d 999 (2d Cir. 1950) (Frank, J.); *United States ex rel. Kaloudis* v. Shaughnessy, 180 F.2d 489 (2d Cir. 1950) (L.Hand, J.). See also *Henderson v. INS*, 157 F.3d 106, 112-17, 121 (2d Cir 1998) (collecting cases); *Magaña-Pizano* v. *INS*, 152 F.3d 1213, 1218-19 (9th Cir. 1998) (same).

deportation is not reviewable in habeas corpus where no other avenue for review is available. Absent an adequate and effective alternative avenue of review,[27] the Suspension Clause requires review of these statutory and constitutional claims.

Judicial review of the legal claim presented here is also grounded in Article III. *See Commodities Future Trading Commission* v. *Schor*, 478 U.S. 833 (1986). Absent some avenue for judicial review, respondent's legal claim would be adjudicated entirely by the Executive Branch without any access, by appeal or otherwise, to an Article III court. This Court has never held that Congress may, consistent with Article III, deprive a litigant of all access to a judicial forum over a generally applicable question of statutory construction where individual liberty is a stake. Likewise, because deportation of a long-time legal resident implicates fundamental interests "basic to human liberty and happiness," *Wong Yung Sung* v. *McGrath*, 339 U.S. 33, 50 (1950); *Ng Fung Ho.* v. *White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of . . . all that makes life worth living"), the requirements of due process mandate access to a judicial forum to present respondent's retroactivity claim.[28]

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[27] See *Swain* v. *Pressley*, 430 U.S. 372 (1977).

[28] The need for judicial oversight is underscored by the frequency with which immigration decisions are vacated and by the interests at stake in deportation. *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492 (7th Cir. 1996) (Posner, C.J.) (noting importance of judicial review where courts reverse the BIA "on a nontrivial number of occasions . . ."); *Rodriguez-Roman* v. *INS*, 98 F.3d 416, 432 (9th Cir. 1996) (Kozinski, J., concurring) (stressing the "importance of independent judicial review in an area where administrative decisions can mean the difference between freedom and oppression").

2. The Ruling on the Merits of Section 440(d) Does Not Warrant Review.

The court of appeal's analysis of the temporal reach of the amendments to Section 1182(c) made by Section 440(d) of AEDPA does not warrant review by this Court. First, there is no conflict among the circuits. Second, the decision has limited application because Section 1182(c) has been repealed for deportation proceedings initiated after April 1, 1997, and thus, controversies over the temporal scope of Section 440(d) are relevant only to a closed set of cases. Third, the decision lacks the far-reaching implications asserted by the government. Fourth, the decision is based on an unremarkable and correct application of this Court's recent precedents. Finally, the decision below is based on only one of many arguments against retroactive application of 440(d) that have not been fully developed in the lower courts.

a. There is no conflict in the circuits. Only the First and Second Circuits have reviewed the Attorney General's conclusion that Section 440(d) applies retroactively. Pet. App. 38a-57a; *Henderson* v. *INS*, 157 F.3d 106, 128-30 (2d Cir. 1998). Both have concluded that her reading of the statute is erroneous as a matter of law.[29] Given the uniformity in the circuit courts, there is no reason for the Court to take, within the span of two terms, a third case concerning the application of the Court's established retroactivity test to a particular statutory provision. *See Lindh* v. *Murphy*, 521 U.S. 320 (1997) (determining whether a particular provision of AEDPA concerning habeas petitions applies retroactively under test established in *Land-*

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[29] Numerous district courts have agreed that Section 440(d) should not be applied retroactively to cases pending on AEDPA's enactment. See, e.g., *Perez* v. *Reno*, 18 F.Supp.2d 674 (W.D.Tex. 1998); *Lee* v. *Reno*, 15 F.Supp.2d 26 (D.D.C. 1998); *Pak* v. *Reno*, 8 F.Supp.2d 1001 (N.D. Ohio 1998); *Sandoval* v. *Reno*, No. 97-7298, 1997 WL 839465 (E.D. Pa. 1997).

graf v. *USI Film Prods.*, 511 U.S. 244 (1994)); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) (determining whether a 1986 amendments to the False Claims Act apply retroactively under *Landgraf* test).

b. The decision below has limited applicability. Section 1182(c) has been replaced by a new form of relief called "cancellation of removal" which governs all removal cases initiated after April 1, 1997. *See* IIRIRA § 304(b), 8 U.S.C. § 1229b (Supp. II 1996). Thus, the lower court's ruling applies to a closed and diminishing set of cases, those commenced prior to April 1, 1997, and will have no permanent impact on the administration of the immigration laws or the future availability of relief for lawful permanent residents convicted of crimes. Those aliens who are currently serving state or federal sentences are governed by the new "cancellation of removal" provision in IIRIRA unless proceedings against them were commenced prior to April 1, 1997.

c. The court of appeal's analysis does not have the "far-reaching ramifications" asserted by the government. Pet. Br. 25. The government contends that the decision below establishes a new presumption against retroactive application of immigration statutes and asserts that such a presumption conflicts with precedents of this Court, *see* Pet. Br. 25 (citing *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)), and the decisions of some courts of appeals (including the First Circuit) with respect to the 1990 amendments to Section 1182(c). The government's contention, however, is based on a misreading of the opinion below.

The court of appeal's ruling was *not* based on its view that a provision governing discretionary relief from deportation is subject to the presumption against retroactivity (a view that, in any event, is correct under this Court's recent decision in *Hughes*). Rather, the court of appeals made clear that its ruling hinged on the specific text, structure and legislative history of AEDPA's amendments, which showed that, as a matter of con-

gressional intent, AEDPA Section 440(d) does not apply to respondent. Pet. App. 41a-57a. Indeed, the court of appeals expressly stated that "[e]ven if Supreme Court precedent" supported the Attorney General's view that the presumption against retroactivity was inapplicable to provisions governing discretionary relief from deportation, the *result* would have been the same because of the manner in which Congress chose to draft the statute. Pet. App. 49a. *See also* Pet. App. 57a ("We have . . . determined through a careful reading of AEDPA's text, confirmed by its legislative history" that Section 440(d) does not apply to respondent). Thus, even assuming that the court of appeals erred in its assumption that Section 440(d)'s amendments to Section 1182(c) triggered the presumption against retroactivity, the result would have been precisely the same. And, because the result in this case rested on Congress's intent as to this particular statute, the court of appeal's opinion has little applicability for cases involving other statutory provisions.[30]

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[30] Because the result below did not hinge on the court of appeal's conclusion that the amendments to Section 1182(c) raised retroactivity concerns triggering the presumption against retroactivity, that conclusion, even if erroneous, would not warrant this Court's attention. Respondent nonetheless notes that the court's conclusion about the applicability of the presumption was, in fact, correct in light of this Court's recent decisions in *Lindh* and *Hughes*. See also *Henderson* v. *INS*, 157 F.3d 106, 129 (2d Cir. 1998) (stating Second Circuit's inclination to view application of 440(d) to cases pre-dating AEDPA as a genuinely retroactive effect triggering presumption against retroactivity, but following First Circuit analysis and holding that regardless of whether presumption applies, Section 440(d) should not apply to cases commenced before AEDPA's passage in light of the statute's text, structure and legislative history).

This Court's decision in *INS* v. *Lopez-Mendoza*, cited by the government (Pet. Br. 25), does not stand for the proposition that immigration statutes generally, or discretionary relief statutes in particular, will never trigger the presumption against retroactivity. *Lopez-Mendoza* was de-

d. The decision below is based on a straightforward application of this Court's decisions in *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) and *Lindh* v. *Murphy*, ___ U.S. ___, 117 S.Ct. 2059 (1997). Both the court below and the Second Circuit in *Henderson* v. *INS*, 157 F.3d 106 (2d Cir. 1998), found that, based on an analysis of the text and structure of Title IV of AEDPA, Congress did not intend retroactively to strip lawful permanent residents of their statutory eligibility to seek relief from deportation. The government does not argue that the court misapprehended the analysis required under this Court's precedents. It simply disagrees with the courts' conclusions as to this particular statute.

In *Lindh* v. *Murphy*, the Court made clear that the first inquiry in a case concerning disputed retroactivity is an examination of the statute's text and history to determine Congress's intent. A court is to employ the "normal rules of construction" and should consider both express evidence of Congress's intent and evidence that is implied by analyzing related provisions and other ordinary tools of statutory construction. *Lindh*, 117 S.Ct. at 2063. If Congress' intent to avoid retroactive application can be discerned from such an analysis, "there is no need

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cided before *Landgraf*, *Hughes* and *Lindh*, and far more importantly, did not remotely involve a retroactivity issue. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984) (question presented is "whether an admission of unlawful presence in this country made subsequently to an allegedly unlawful arrest must be excluded as evidence in a civil deportation hearing."). Notably, *Landgraf* itself relied on examples from immigration statutes to illustrate the presumption against retroactivity. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 271-72 (1994). To the extent that there are lower court cases that held that the 1990 amendments to Section 1182(c) did not trigger the presumption against retroactivity, see Pet. Br. 25 (citing cases), those decisions (as well as the Attorney General's decision in *Soriano*) also pre-dated *Landgraf*, *Hughes* and *Lindh*.

to resort to judicial default rules." *Landgraf*, 511 U.S. at 280. The First Circuit applied exactly that process and reached the correct result.

In particular, in AEDPA Sections 413 and 421, Congress used language mandating full retroactivity for provisions that denied terrorists the possibility of obtaining relief from deportation. No such retroactivity language was included for Section 440(d). Where Congress chose to deviate from the principle of prospectivity it did so with explicit language and specified the degree of retroactivity it intended. *See* Pet. App. 51a; *see also Henderson*, 157 F.3d 106, 128-30 (2d Cir. 1998) (agreeing with First Circuit's analysis and conclusion regarding text, structure and history of AEDPA Section 440(d)).

The government suggests that the First Circuit ignored other specific provisions of Title IV that contained language mandating prospective application and that such language would not have been necessary if Congress intended only prospective application for provisions, like Section 440(d), that are silent as to their temporal reach. Pet. Br. 26-27 (citing AEDPA 435(b), 440(f), and 441(b)). But, as the court of appeals noted, Sections 413 and 421, like Section 440(d), are concerned with "relief from deportation," Pet. App. 44a, and therefore are the most relevant comparative provisions. They show that when Congress wanted to impose the type of full retroactivity sought by the government, it knew how to do so. The First Circuit understood that those provisions are "particularly helpful" in determining the reach of Section 440(d). Pet. App. 44a. Furthermore, as other courts have shown, each of the provisions of Title IV of AEDPA that contained language specifying their temporal scope, including each of the provisions cited by the government, was in some degree retroactive. *See Mojica* v. *Reno*, 970 F. Supp. 130, 172-73 (E.D.N.Y. 1997), *aff'd sub nom Henderson* v. *Reno*, 157 F.3d 106 (2d Cir. 1998); *Sandoval* v. *Reno*, 1997 WL 839465, at *11 (E.D. Pa. 1997). Congress's silence as to Section 440(d) therefore cannot reasonably

be read as adopting the most extreme retroactivity provisions found in Sections 421 and 413.

The government also tries to minimize the legislative history showing that Congress rejected the precise type of retroactivity that the Attorney General is seeking to impose. Pet. Br. 27 n.17. This history shows that the conference chose to adopt the substantive scheme from the Senate bill and the retroactivity scheme from the House bill. Pet. App. 52a-55a. Had the conference sought to achieve the type of full retroactivity found in the Senate bill, it would have not have removed the language that called for such full retroactivity.

Finally, the government contends that the court of appeals should have deferred to the Attorney General's conclusion that Section 440(d) applies to all pending applications. Pet. Br. 27. The court of appeals assumed that the *Chevron* deference doctrine applied to the Attorney General's opinion, but found that the text and history of the statute answered the question. Pet. App. 39a-41a. The government simply disagrees with the court of appeals's analysis of the text, structure and history of the statute.[31]

e. The merits issue is not sufficiently developed in the courts of appeals to warrant the Court's review. Even if this Court were to reject the First and Second Circuit's analysis of the text and structure of the statute, it would face additional arguments against reading Section 440(d) to apply retroactively. These arguments have not been fully developed in the

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[31] Although the court of appeals assumed that *Chevron* deference was applicable, there was, in fact, no statutory interpretation by the Attorney General to which a court could defer. The Attorney General improperly looked only at whether there was express retroactivity language in Section 440(d) itself, and did not examine other provisions of AEDPA, nor did she examine the legislative history of AEDPA's amendments. As *Lindh* made clear in a decision issued after the Attorney General ruled, the Attorney General was required to utilize all the normal tools of statutory construction.

lower courts. First, the Court would face the second step of the *Landgraf* analysis if it determined that, contrary to the conclusion reached by the First and Second Circuits, the temporal reach of Section 440(d) could not be determined through an examination of AEDPA's text, structure and amendments. This second step requires a determination whether the presumption against retroactivity is applicable. The applicability of the second stage of *Landgraf* analysis has been addressed by the district courts, but has not been fully developed in the courts of appeals. *See, e.g., Wallace* v. *Reno*, No. 98-11182-NG, 1998 U.S. Dist. LEXIS 16807 (D. Mass. Oct. 7, 1998) (applying *Landgraf*); *Hsue Li Lee* v. *Reno*, 15 F. Supp. 2d 26, 56 (D.D.C. 1998); *Mojica* v. *Reno*, 970 F. Supp. 130, 173-80 (E.D.N.Y. 1997); *cf. Henderson* v. *Reno*, 157 F.3d 106, 128 (2d Cir. 1998) (noting that it is inclined to believe that 440(d) is "genuinely retroactive" but not reaching issue).

Finally, if Section 440(d) applied retroactively, it would violate Equal Protection. Of the few district courts that have agreed with the government that Section 440(d) applies retroactively, virtually all have found that barring relief for lawful permanent residents in deportation proceedings is a denial of Equal Protection because those same lawful permanent residents would have been eligible to apply for relief if they had taken a trip out of the country and been put in exclusion proceedings on their return. *See, e.g., Thompson* v. *Perryman*, No. 98C1596, 1998 U.S. Dist. LEXIS 12527, at *30 (N.D. Ill. Aug. 5, 1998); *Avelar-Cruz* v. *Reno*, 6 F. Supp. 2d 744, 757 (N.D. Ill. 1998); *Jurado-Gutierrez* v. *Greene*, 977 F. Supp. 1089, 1093 (D. Colo. 1997). This equal protection problem further counsels in favor of the First and Second Circuits' ruling that Section 440(d) does not apply retroactively.

3. Finally, if the Court were to grant review on the jurisdictional issue, the Court should grant review in *Magaña-Pizano* v. *INS*, No. 98-0836. In *Magaña-Pizano*, the respondent sought judicial review both directly in the Ninth Circuit by means of a

petition for review and in district court by means of habeas corpus. *Magaña-Pizano* assures the Court that it would be squarely presented with the jurisdiction of both the courts of appeals and the district courts to hear respondent's claims.

CONCLUSION

For the reasons set forth herein, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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No. 98-835

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ET AL., PETITIONERS

v.

RAUL PERCIRA GONCALVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF AUTHORITIES

Cases:

Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) 6
CFTC v. *Schor*, 478 U.S. 833 (1986) 6
Carlson v. *Landon*, 342 U.S. 524 (1952) 6
Chew Heong v. *United States*, 112 U.S. 536 (1884) 8
Chow v. *INS*, 113 F.3d 659 (7th Cir. 1997) 5
Crowell v. *Benson*, 285 U.S. 22 (1932) 6
FEC v. *NRA Political Victory Fund*, 513 U.S. 88 (1994) 5
Felker v. *Turpin*, 518 U.S. 651 (1996) 4
Henderson v. *INS*, 157 F.3d 106 (2d Cir. 1998), petition for cert. pending *sub nom. Reno* v. *Navas*, No. 98-996 ..... 2, 6
INS v. *Yueh-Shaio Yang*, 519 U.S. 26 (1996) 8
Jay v. *Boyd*, 351 U.S. 345 (1956) 8
Jean-Baptiste v. *Reno*, 144 F.3d 212 (2d Cir. 1998) 7
Kolster v. *INS*, 101 F.3d 785 (1st Cir. 1996) 5
LaGuerre v. *Reno*, No. 98-1954 (7th Cir. Dec. 22, 1998) 2, 6, 7, 8, 9
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 7, 8, 9
Richardson v. *Reno*, No. 98-4230, 1998 WL 889376 (11th Cir. Dec. 22, 1998) 3, 4
United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 5
United States ex rel. Hintopoulos v. *Shaughnessy*, 353 U.S. 72 (1957) 5

Constitution and statutes:

U.S. Const.:
Art. I, § 9, Cl. 2 (Suspension of Habeas Corpus Clause) 5
Art. III 5

Statutes—Continued: Page

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 *et seq.*:
§ 413, 110 Stat. 1269 8
§ 421, 110 Stat. 1270 8
§ 440(a), 110 Stat. 1276 ..... 3, 4
§ 440(d), 110 Stat. 1277 ..... 1, 7, 8, 9
§ 440(e), 110 Stat. 1277 9
§ 440(f), 110 Stat. 1278 ..... 8, 9
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 309(c)(4)(G), 110 Stat. 3009-626 3-4
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1182(c) (1994) 1, 5, 9
8 U.S.C. 1252(a)(2)(C) (Supp. II 1996) 4
8 U.S.C. 1252(g) (Supp. II 1996) 3, 4
28 U.S.C. 2241 ..... 1, 2, 3, 4, 6

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REPLY BRIEF FOR THE PETITIONERS

1. *Jurisdiction.* Respondent argues (Br. in Opp. 13-15) that there is no conflict among the circuits on the jurisdictional decision of the court below—namely, that the district courts have jurisdiction under the general federal habeas corpus statute, 28 U.S.C. 2241, to review a criminal alien's claim that the Attorney General erroneously determined that Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1277, applies in pending deportation cases to bar discretionary relief from deportation under 8 U.S.C. 1182(c) (1994) to certain classes of criminal aliens. Recently, however, two courts of appeals have disagreed with the First Circuit's jurisdictional ruling in this case, and have held that Congress precluded access to the district courts in immigration cases under Section 2241.

In *LaGuerre* v. *Reno*, No. 98-1954 (Dec. 22, 1998), which as respondent notes (Br. in Opp. 14 n.19) involves the same jurisdictional and merits issues as those presented here, the Seventh Circuit squarely rejected the First Circuit's decision in this case. The Seventh Circuit held that a district court could not exercise jurisdiction under Section 2241 over either the non-constitutional claim or the constitutional claim that respondent has sought to raise in this case. See *LaGuerre*, slip op. 7 ("We conclude that for the class of aliens encompassed by [AEDPA] section 440(d), judicial review by means of habeas corpus did not survive the enactment of that section."). The Seventh Circuit noted that the purpose of Congress's 1996 amendments to the immigration laws limiting jurisdiction over criminal aliens' challenges to their deportation orders "was to curtail and speed up judicial review of deportation orders against disfavored classes of criminals, such as drug offenders." *Id.* at 6. But "[i]f the effect of the new provision was, as [respondent here and the *Goncalves* court] believe, to shift judicial review to the district court, followed of course by appeal to this court, then Congress *enlarged* judicial review for these deportees (and for no others![])." *Ibid.* (emphasis added); see *id.* at 7 (noting that, if the *Goncalves* court is right, then "Congress accomplished nothing toward its aim of curtailing judicial review," and "[m]aybe less than nothing, if by closing the door to review by the courts of appeals Congress simultaneously opened the door to review by the district courts *followed by* review by the courts of appeals").[1]

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[1] See also *Henderson* v. *INS*, 157 F.3d 106, 119 n.9 (2d Cir. 1998) (considering itself bound by prior circuit decision to find that district court had jurisdiction, but acknowledging that "review in the courts of appeals seems more consistent with congressional intent"), petition for cert. pending *sub nom. Reno* v. *Navas*, No. 98-996 (filed Dec. 17, 1998).

Similarly, in *Richardson* v. *Reno*, No. 98-4230, 1998 WL 889376 (Dec. 22, 1998), the Eleventh Circuit concluded that Congress "strip[ped] all jurisdiction, including § 2241 habeas, from the district courts." *Id.* at *4. The Eleventh Circuit emphasized (*id.* at *13) that 8 U.S.C. 1252(g) (Supp. II 1996) provides that, notwithstanding "any other provision of law, no court shall have jurisdiction" to review the decision of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders under the Immigration and Nationality Act (INA). As the Eleventh Circuit explained, Section 1252(g)'s "broad admonition that it applies 'notwithstanding any other provision of law' sufficiently and clearly encompasses other provisions of law, such as § 2241. When Congress says 'any,' it means 'any' law, which necessarily includes § 2241." *Richardson*, 1998 WL 889376, at *13.[2]

Respondent suggests (Br. in Opp. 15-16) that this case is of limited importance because it concerns only the transitional jurisdictional rules in Section 440(a) of AEDPA, 110 Stat. 1276, and Section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

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[2] Respondent argues (Br. in Opp. 15 n.21) that *Richardson* does not conflict with the decision below because it did not involve judicial review of a final order of deportation. The ruling in *Richardson*, however, was *broader* in scope than the context of review of final deportation orders, and necessarily encompassed the conclusion that the district courts lack jurisdiction under Section 2241 to entertain challenges to final orders of deportation. See *Richardson*, 1998 WL 889376, at *13 ("Accordingly, we conclude that [Section 1252(g)] repeals any statutory jurisdiction over immigration decisions other than that conferred by [Section 1252]. That repeal includes § 2241 habeas jurisdiction over immigration decisions by the Attorney General under the INA."). Indeed, the Eleventh Circuit further addressed and rejected Richardson's contention that, if Section 1252(g) precludes district court habeas jurisdiction over immigration decisions under Section 2241, then it violates the Constitution because he would have no opportunity for judicial review of his final order of deportation. See *id.* at *28-*29.

(IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-626. That is incorrect. A central aspect of the First Circuit's decision was its rejection (Pet. App. 26a-28a) of the government's argument that Section 1252(g)—which applies also to IIRIRA's permanent review provisions—precluded the district court from exercising habeas jurisdiction under Section 2241.[3] Thus, district courts in the First Circuit, bound by that decision, are likely to conclude in the future that, notwithstanding Section 1252(g), they may exercise habeas jurisdiction under Section 2241 at the behest of criminal aliens who are barred by IIRIRA's permanent preclusion of review provision, 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996), from raising certain claims by petition for review directly in the court of appeals. Indeed, respondent has pointed to no difference between that permanent provision and the preclusion-of-review provisions in Section 440(a) of AEDPA and Section 309(c)(4)(G) of IIRIRA that would suggest any difference in outcome. As a result, the bifurcated review scheme adopted by the court of appeals, which perversely gives *greater* opportunities for judicial review of deportation orders to the very criminal aliens whose removal Congress wished to expedite, is likely to persist. See also Pet. 24 n.15.[4]

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[3] Indeed, respondent defends (Br. in Opp. 18) this aspect of the court of appeals' decision as a correct application of the presumption against repeal of habeas corpus articulated in *Felker* v. *Turpin*, 518 U.S. 651 (1996), and as avoiding serious constitutional questions about Section 1252(g). As the Eleventh Circuit observed in *Richardson*, however, *Felker* does not support the First Circuit's construction of Section 1252(g) in the decision below, because the withdrawal of jurisdiction in Section 1252(g) is much broader than it was in the statute examined in *Felker*. "Unlike *Felker*, the language of [Section 1252(g)] does not require repeal by implication. Indeed, Congress could hardly have chosen broader language to convey its intent to repeal any and all jurisdiction except that provided by [the INA itself.]" *Richardson*, 1998 WL 889376, at *14.

[4] Respondent contends (Br. in Opp. 6) that the position advanced in our petition, that a criminal alien covered by the jurisdiction-limiting and

Respondent also notes (Br. in Opp. 18-20) that this Court has considered, on habeas corpus proceedings, aliens' claims that they were eligible to be considered for discretionary relief from deportation. In neither *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), nor *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957), did the Court's opinion address the question of habeas corpus jurisdiction, however, and certainly in neither case did the Court suggest that habeas corpus jurisdiction was required by the Constitution itself. This Court has never considered itself bound by *sub silentio* jurisdictional holdings in the manner respondent suggests. See *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994). And although respondent maintains (Br. in Opp. 20) that judicial review of his *non-constitutional* claim is required by Article III as well as the Suspension of Habeas Corpus Clause, U.S. Const., Art. I, § 9, Cl. 2, this Court has recognized that the federal courts have jurisdiction under Article III to review statutory questions only to the extent that Congress assigns

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preclusion-of-review provisions of AEDPA and IIRIRA may nonetheless raise constitutional challenges to provisions of the INA affecting his deportation order on a petition for review in the court of appeals, is inconsistent with the government's position in *Kolster* v. *INS*, 101 F.3d 785 (1st Cir. 1996), and *Chow* v. *INS*, 113 F.3d 659 (7th Cir. 1997), where the government moved for dismissal of the petitions for review. *Kolster*, however, involved a claim that the Attorney General had incorrectly construed another aspect of Section 1182(c)'s requirements for eligibility for discretionary relief from deportation, see 101 F.3d at 787; we argued there, as we have argued here (Pet. 21) that Congress permissibly withdrew the federal courts' jurisdiction to consider such *non-constitutional* claims involving eligibility for discretionary relief from deportation. *Chow* also involved only non-constitutional challenges to the alien's deportation order. See 113 F.3d at 662. After AEDPA was enacted, Chow argued that its withdrawal of review in the court of appeals was itself unconstitutional, see *id.* at 668, but that is not a "constitutional claim[]" raised against the deportation order itself (see Br. in Opp. 6).

it to them, see *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984), and also that "[t]he power to expel aliens, being essentially a power of the political branches of government, * * * may be exercised entirely through executive officers, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit," *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952) (internal quotation marks omitted); see *ibid.* ("No judicial review [of deportation orders] is guaranteed by the Constitution.").[5]

2. *Merits.* Respondent argues (Br. in Opp. 21-22) that there is no conflict in the circuits on the merits of the Attorney General's decision in *In re Soriano* (Pet. App. 125a-138a) that Section 440(d) of AEDPA applies to all applications for relief from deportation pending at the time of AEDPA's enactment. In *LaGuerre*, however, the Seventh Circuit ruled (slip op. 9-10), contrary to the court below, that the Attorney General's decision in *Soriano* is correct.[6] The

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[5] Respondent relies (Br. in Opp. 20) on *CFTC* v. *Schor*, 478 U.S. 833 (1986), for the proposition that the federal courts must have authority to review his non-constitutional claim. That case, however, involved a federal agency's authority to adjudicate a state-law claim, not limitations on a federal court's jurisdiction to review a federal agency's determination of a federal statutory issue. See *id.* at 850-852. Moreover, the Court has noted that immigration cases involve "public rights" that may be assigned to administrative agencies for adjudication. See *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932).

[6] Although the Seventh Circuit concluded that the district court had no jurisdiction over the aliens' habeas corpus petitions under Section 2241 (see p. 2, *supra*), it noted the possibility that the aliens might be able to raise their claims by petitions for review in the courts of appeals, see *LaGuerre*, *supra*, slip op. 8-9, 10-11, and it addressed the merits of their contentions "lest [the aliens] feel that [the court has] tripped them up on a technicality" (namely, having filed "in the wrong court under the wrong statute"), *id.* at 9. Even if the court of appeals' discussion of the merits of the aliens' claims was technically dictum, it will almost surely be followed by subsequent panels of that court. Compare *Henderson*, 157 F.3d at 119

Seventh Circuit concluded that the application of Section 440(d) to pending cases does not implicate the presumption against retroactivity because "[i]t would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation." *LaGuerre*, slip op. 10. Given the conflict of authority on a matter affecting thousands of aliens already in deportation proceedings or pursuing federal-court litigation (see Pet. 23), review of the lower court's decision on the merits is warranted.

Respondent also argues (Br. in Opp. 22-23) that the decision below did not articulate or rely on a presumption against retroactivity. That contention, however, cannot withstand scrutiny. The First Circuit squarely held (Pet. App. 43a) that "[t]he Attorney General's application of the new AEDPA restrictions takes away a form of relief that, while discretionary, is plainly substantive, and so implicates [the] presumption against retroactivity" articulated in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). Under the decision below, therefore, congressional enactments restricting the circumstances under which aliens may be granted discretionary relief from deportation, or expanding the circumstances under which they may be deported, are considered "substantive" and are therefore subject to the presumption against retroactivity. That application of the presumption against retroactivity to deportation cases has far-reaching implications for the Attorney General's ongoing administration of the Nation's immigration laws, conflicts

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(following conclusion in *Jean-Baptiste* v. *Reno*, 144 F.3d 212, 229-220 (2d Cir. 1998), which was arguably dictum, that Section 2241 jurisdiction remains available in district courts for criminal aliens).

with the Seventh Circuit's decision in *LaGuerre*, and warrants review.[7]

Unlike the court of appeals, respondent acknowledges (Br. in Opp. 25) that Congress expressly directed that other provisions of AEDPA be applied prospectively only, but he nevertheless argues that a court should not infer from that fact that Congress intended that Section 440(d) be applied to pending cases. He argues that the "most relevant comparative provisions" to Section 440(d) supposedly are others in AEDPA that Congress expressly directed be applied to pending cases. But if one is examining Congress's intent as to the temporal scope of Section 440(d), the most relevant comparison would not be (as respondent argues) to provisions in different subtitles of AEDPA (see AEDPA § 413, 110 Stat. 1269, and § 421, 110 Stat. 1270) but rather to an effective-date provision in the *same* section of AEDPA,

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[7] Respondent observes (Br. in Opp. 24 n.30) that *Landgraf* relied on *Chew Heong* v. *United States*, 112 U.S. 536 (1884), to support the presumption against retroactivity. See *Landgraf*, 511 U.S. at 271-272. *Chew Heong*, however, turned crucially on the fact that, under a preexisting treaty between the United States and China, certain Chinese nationals then in the United States had what the Court described as "the right to go from and return to the United States at pleasure, without being subjected to regulations or conditions affecting that right." 112 U.S. at 539; see *id.* at 543. Because the treaty had secured such a right, the Court concluded that a subsequent Act of Congress, requiring a certificate for a Chinese national to reenter the United States, should not be applied to a Chinese national who had left the United States before the Act was passed and thereafter sought to reenter, because to apply it in that manner would retroactively impair the "rights previously vested" in him. See *id.* at 559. By contrast, the application of Section 440(d) of AEDPA to pending deportation proceedings does not affect any "rights previously vested," because no alien has a right to discretionary relief from deportation. See *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996); *Jay* v. *Boyd*, 351 U.S. 345, 354 (1956). The Attorney General's construction of Section 440(d) in *Soriano*, therefore, is not "retroactive" at all.

Section 440(f). See 110 Stat. 1278. Since Congress, in Section 440(f), made *only* the amendments in Section 440(e) applicable to cases in the future, it is equally, if not more, reasonable to infer that Congress intended the rest of Section 440, including Section 440(d), to apply to all pending cases.

Finally, respondent argues (Br. in Opp. 26-27) that the merits of the Attorney General's decision in *Soriano* have not been sufficiently examined in the courts of appeals because the First and Second Circuits have considered only the first step of the *Landgraf* analysis, and have not also applied the second step, involving the presumption against retroactivity. As just explained, however, the court below *did* apply the presumption against retroactivity. See Pet. App. 41a-44a. The Seventh Circuit, moreover, has now issued a directly contrary ruling. See pp. 6-7, *supra*. The application of *Landgraf* principles to Section 440(d) has been thoroughly aired in the courts of appeals and in dozens of district court decisions and is fully ripe for this Court's consideration.[8]

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[8] Respondent also notes (Br. in Opp. 27) that he has raised a constitutional equal-protection challenge to Section 1182(c), and that the court of appeals' decision made it unnecessary for that constitutional claim to be resolved. It is true that, if the Court were to agree with respondent that the district court had habeas corpus jurisdiction in his case but were to agree with the government that Section 440(d) is applicable to his case, then the courts would have to consider respondent's constitutional claim on remand. It is unlikely, however, that the courts of appeals will be able to avoid the constitutional issue raised by respondent. The same claim has been raised by many aliens whose deportation proceedings were commenced after AEDPA's date of enactment, and the Seventh Circuit has already concluded that the claim has no merit. See *LaGuerre*, slip op. 11. Further, if the Court grants certiorari in *INS* v. *Magana-Pizano*, No. 98-836, as respondent has agreed it should do if it grants review in this case (see Br. in Opp. 27-28), and if the Court concludes in that case (as we have argued, 98-836 Pet. 18-19) that the Ninth Circuit had jurisdiction over the

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

DECEMBER 1998

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alien's constitutional claim raised in the petition for review (the same claim as the one raised in this case), then the Ninth Circuit will in any event have to address that claim on remand from this Court.